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BIAS CRIMES

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HEARING
BEFORE THE
SUBCOMMITTEE ON
CRIME AND CRIMINAL JUSTICE
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED SECOND CONGRESS
SECOND SESSION

MAY 11, 1992

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BIAS CRIMES

MONDAY, MAY 11, 1992

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME AND CRIMINAL JUSTICE,
COMMITTEE ON THE JUDICIARY,
New York, NY.

The subcommittee met, pursuant to notice, at 10 a.m., at 2600 Ocean Ave., Pri Eitz Chaim Jewish Center, Brooklyn, NY, Hon. Charles E. Schumer (chairman of the subcommittee) presiding.

Present: Representatives Charles E. Schumer and F. James Sensenbrenner, Jr.

Also present: Dan Cunningham, assistant counsel; Bruce Morgan; clerk; Lyle Nirenberg, minority counsel; and David Hecht, intern.

OPENING STATEMENT OF CHAIRMAN SCHUMER

Mr. SCHUMER. The hearing will come to order.

The Chair has received a request to cover this hearing in whole or in part by television broadcast, radio broadcast, still photograph or other similar methods, and in accordance with committee rule 5, permission will be granted unless there is objection. Without objection.

First, before I begin, I want to welcome my colleague, Jim Sensenbrenner. He is the ranking member of our Crime Subcommittee. He is from Wisconsin, and it was very good of him to come here.

Welcome to my district, Jim. This is probably the first time you have been here. He took the long way from the airport. I went through the parkway. And I appreciate your being here.

Good morning, ladies and gentlemen. Last week in Los Angeles, we saw through the lens of the video camera and the television a graphic, savage illustration of why we are here today. From a camera perched on a helicopter, we watched in horror while a truck-driver was pulled from his truck and nearly beaten to death by the mob. His crime was that he was white and in the wrong place at the wrong time.

Then there is the man who was beaten bloody with beer bottles until he was dragged from the angry mob by a good Samaritan. The irony is that the beaten man had grown up in the south-central Los Angeles neighborhood, but that didn't matter, because he was Japanese-American and that was reason enough.

And in the incident that touched off the maelstrom, the beating of Rodney King. Many people believe it happened simply because King was black and the officers were white. In its savage burst of

anger, the riot in Los Angeles underscores this disappointing truth—we live in a season of hate that seems to be growing deeper.

This certainly comes as no surprise to the Congregation Pri Eitz Chaim, for their synagogue in which we now sit was viciously desecrated only last month when swastikas—symbols of the most diabolical hate crime in history, the Holocaust—were smeared upon its walls.

I saw this morning that the synagogue had diligently painted over the previous desecration, and there is a new one up there today, although the rabbi tells me it is the belief of the police that this was done by someone else, a sort of copycat.

It is time for the Nation to open its eyes and face the truth about the resurgence of bias and hate. It should not go unreported. It should not go unpunished. The bigots should be put on notice that the rest of us may be tolerant, but we won't tolerate them or their actions.

The incidents I have just mentioned are mere anecdotes of a disturbing pattern tracked by statistics. The Anti-Defamation League reports that the number of anti-Semitic incidents increased to record levels in 1991. The number of incidents against gays increased 31 percent. The Southern Poverty Law Center's Klanwatch Project reported a 27-percent increase in the number of white supremacist groups.

What is behind this resurgence in hatred that turns to violence? Certainly, in part, the economic recession can be blamed. Hard times breed contempt among groups who are competing for a shrinking piece of the pie.

But this trend has also taken hold because, unfortunately, bigotry has become more accepted than it has been at any time since the 1960's.

Some of our most influential political leaders have set the wrong tone of division and resentment among different ethnic groups. For instance, David Duke blamed all of our problems on welfare, but he might as well have blamed African-Americans.

And the Federal Government has sent the wrong message, too. Incredibly, the Federal sentencing guidelines do not give judges any discretion to impose longer sentences for crimes motivated by bias. The law's silence on this point doesn't encourage hate crimes, but it doesn't discourage it either.

Earlier this month I took steps to change that by introducing the Hate Crimes Sentencing Enhancement Act, which will increase Federal sentences by at least a third for any violent crime in which hate animus is a motivation.

Now, 2 years ago we laid the foundation for this bill with the Hate Crimes Statistics Act, which requires an annual report of hate crimes nationwide. Today, the FBI will appear before us to report on their progress toward publishing the first annual survey in August.

And the State of New York is not setting the right tone for its citizens either, I am sorry to say. Governor Cuomo introduced similar bias crime legislation in Albany, but it is languishing in the State senate, which refuses to pass it because it extends protections to gay and lesbian victims of bias crime.

The laws of the Government should reflect the social mores of our society. I believe the bulk of our society doesn't condone such violence.

I have to say, when I stood out here this morning outside the synagogue, it occurred to me that the swastika on the synagogue is not just a crime against the people of this synagogue. It is a crime against a whole group.

When Mr. Phillip's house was burnt, a black man moving into a relatively white neighborhood, it was not just a crime against him or his home, but against a whole group of people.

When Mr. Bencivenga's daughter was raped because she was white, that, too, is not simply a crime that he and his family alone have to bear.

And when Peg Rivera's brother-in-law was killed because he was gay, again, this was a crime not just against her family, but the whole group.

That is why we have such animus against hate crimes. Not only do they hurt the individual affected, they hurt every single one of us.

I would say to my colleagues that if America is going to be a world leader in the 21st century—we want to keep America number one. Democrats, Republicans, all of us want to keep America number one. Well, if we are going to be torn apart by hatred, if we are going to spend all our time, blacks fighting with whites and whites fighting with blacks, Christians fighting with Jews and Jews fighting with Christians, every group in society fighting with someone else, there are other societies beyond our borders that are going to gain on us.

And so this is not simply a message of care about one another and live and let live, the great American tradition, but a message that relates to the survival of this country as the leading country of this world. Because all the energy and time we spend hating one another could be productively spent toward making the country better and helping us compete.

And so I say to everybody that this committee, and I know I am joined by my colleague, Jim Sensenbrenner, who feels very, very strongly about this as well, we will do everything we can to see that the Federal Government becomes a leader in the fight against hate crimes.

I would now like to recognize Jim Sensenbrenner. Jim and I are from different parties, from different parts of the country. We have our disagreements, we also have our agreements. I again want to thank him for coming here today.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman. It certainly is a pleasure to visit your district. I do recall that my one previous trip to Brooklyn was to watch the then Milwaukee Braves beat the Dodgers. Hopefully this trip will be as successful as the one I had some 35 years ago.

I come today as one who has been concerned about the rise of hate crimes as well as the lowering of standards for law and order in our country. Two years ago, against the advice of some of my more conservative Republican colleagues, I did support the Hate Crimes Statistics Act which was passed by the Congress and signed into law by President Bush.

However, in approaching this issue today, which is to provide enhanced penalties and a greater Federal role for hate crimes, we have to be mindful of the fact that this bill that is before us today poses both first amendment and equal protection problems. And I believe that it is important for this subcommittee to exercise great care lest we pass a law that will be struck down by the Federal courts as violative of the Constitution and consequently we will have accomplished nothing.

In my opinion, also, there is no substitute for State and local law enforcement. This subcommittee has repeatedly lectured that Congress should not federalize street crimes and leave these types of crimes for State and local law enforcement to prosecute and investigate. I reject that notion and believe that there has to be a Federal role, not just in the area of hate crimes, but in other violence.

It seems to me that the Federal role can be best complemented by two things: First, mandatory penalties for gun-related violent crimes such as those which Senator D'Amato and I have proposed and which Senator D'Amato was able to get passed in the U.S. Senate; and, second, the institution of the death penalty at both the State and local level, because the death penalty does act as a deterrent.

Now, I come from Milwaukee, which was the scene of the one of the most grizzly crimes committed in the last year or two, those which Geoffrey Daumer admitted prior to being tried and found sane in the circuit court of Milwaukee County. It is significant that Mr. Daumer, who as he was being interrogated by the police, as well as public statements that he made, stated that he chose Wisconsin and Ohio to commit his crimes because there was no death penalty there. And I do believe that the death penalty acts as a deterrent, and I believe we should be talking about the death penalty for grizzly crimes, whether they are motivated by race or religion or national origin or ethnicity or sexual preference or any other area where violence ensues.

I would hope that the witnesses that come before this subcommittee today testify not only to crimes that are perpetrated by whites against minority groups, but also the other way around, as well as crimes that are perpetrated by one minority group against the other, which we saw graphic evidence of when we saw the films and the videos from Los Angeles on the television in the last week or so.

Recent tragic incidents both here in Brooklyn and Los Angeles show the need for serious investigation into this area on how the Federal Government, in conjunction with both State and local governments, could more effectively deal with the rise of violence that is directed against people simply because the ethnicity, religion, national origin, or the color of their skin.

So I am happy to be here today to talk about this important subject, and I look forward to the witnesses' testimony.

Mr. SCHUMER. Thank you, Jim.

Certainly I would agree that we have to have a broad and comprehensive approach. As you know, my view is that the Federal Government has to get more involved in the fight against crime. We just simply have to back it up with some dollars instead of just putting some more laws on the books.

But that is a subject we have debated long and hard in the crime bill, which we passed in the House, which has many of the things you have called for, including the dollars, the death penalty and other things. But here we are going to look at the issue of hate crimes themselves and what, if anything, the Federal Government should do.

So we have a panel of witnesses. Unfortunately, one of the four witnesses is not here. Let me introduce the other three and then mention the fourth.

The first witness is Rabbi Melvin Burg, who is our host here this morning, and also the victim of a bias crime. It is particularly appropriate that we are holding this hearing at the Ocean Avenue Jewish Center where I have spent 18 years as an elected official, in and out all the time, and where I learned a month ago of the terrible incident that occurred, and now was repeated last week. And I want to personally thank Rabbi Burg and his congregation for extending his hospitality to this subcommittee.

The first time we scheduled this hearing was about 3 or 4 weeks ago. I want to thank all the witnesses for rescheduling, as well as Jim and everyone else. My father-in-law passed away 2 days before that scheduled hearing, so we couldn't have the hearing.

Our second witness is Peg Rivera whose brother-in-law was viciously murdered simply because of his sexual orientation.

Our third witness is someone who is from my community, a gentleman I have known for a long time, Ralph Bencivenga, whose 15-year-old daughter was kidnaped and raped in a brutal bias-motivated crime, simply because she was white.

And finally, our fourth witness is another gentleman I have come to know since he was unfortunately the victim of a bias crime. He is not here. We hope he is on his way. That is Mr. Wilfred Phillip of New York. His home was burned just before he was to move into a white neighborhood. I am happy to say that Mr. Phillip did persist, did move into his home and is happily living there with the assistance of his neighbors on the block. I hope he will be here to testify to it.

Every one of your statements, ladies and gentlemen, will be written into the record, which we will distribute to all of the members of the subcommittee, as well as the full Judiciary Committee. So you may proceed as you wish.

Rabbi Burg, you may begin.

STATEMENT OF RABBI MELVIN BURG, CONGREGATION PRI EITZ CHAIM

Rabbi BURG. Good morning. On behalf of the congregation, we would like to welcome you here this morning.

The original date of this hearing was supposed to be during the festival of Passover, a time in which we mark the first time that a minority group arose, unshackled themselves from bondage by a superior force.

On March 29, this congregation was slapped in the face, collectively. Coming to services that morning, there were four humongous swastikas painted on the doors of the synagogue itself. Not only the center building next door, in which we house a school

for Russian children and the senior citizens center, but on the synagogue building itself.

In order for us to show our outrage, our feelings about this, we had a massive community rally on April 9, which cut across lines of race, religion, color. We had people of every sort coming to the congregation to express outrage at this type of an act.

On April 26, the next door building was also marked by a swastika. This one unfortunately seems to be that of a copycat, of some teenager who was trying to emulate the original marks on this building.

Unfortunately, gentlemen, the feeling is this: That there is an air in this entire country that erupted in Los Angeles. A block away, we have a Catholic Church, St. Edmund's. In December, a statue of the Madonna was stolen from the grotto. We are not so far away from Church Avenue, where a boycott was launched against the Koreans.

These ideas are against everything that religion teaches. A house of worship should not be marked by a swastika, which is a symbol of hate and evilness and destruction, and the worst in humanity. A statue should not be taken from a grotto which symbolizes religion. And people seeking to earn a living should not be boycotting, for whatever reason.

Unfortunately, it is felt that when a person such as David Duke, Mr. Buchanan, and others can make certain remarks which seem to put down minorities and get away with it, it is not appreciated by the total community of this country.

We support any increased sentences. And to tell you a little story, about 8 or 9 years ago we had a similar incident of two swastikas painted, small ones, on the synagogue. At that time we caught the perpetrator, a young man about 15 years old. He did not know what a swastika meant. All he knew is that it is something a Jew doesn't like.

We prosecuted, we went to court, and I must tell you openly that I felt that it was a laugh-off, so we did, it was a kid, forgive and forget. We did not. And he was given 30 hours of community service in the synagogue.

But what upset me the most is when I called the school this young man attended and I spoke to the principal, and he was shocked that they didn't know what a swastika was. He was shocked that all they knew was that Jews don't like it, they didn't know why.

We have to educate, but we have to increase sentences. We have to educate, but we have to bring this country to a higher level of understanding of toleration of one group with another group, toleration, and not to hurt anyone else.

Thank you very much.

Mr. SCHUMER. Ms. Rivera.

STATEMENT OF PEG RIVERA

Ms. RIVERA. Good morning, Chairman Schumer, Congressman Sensenbrenner, and members of the subcommittee on Crime and Criminal Justice. I am here today to represent the family of Julio Rivera and also to represent the families and victims of hate-motivated crimes.

Julio Rivera was my dear brother-in-law. Julio was a 29-year-old gay man who was stabbed with a knife and bludgeoned to his death with a clawhammer and a pipe wrench on July 2, 1990. Three young Caucasian males have been found guilty of Julio's murder.

Julio is not the first gay man slaughtered in the city of New York. What makes Julio's case so significant is the fact that one of his murderers willingly testified in court that they killed Julio because he was gay.

Attached to my written statement submitted to the subcommittee are two newspaper clippings which chronicle the confession of Dan Doyle. "I killed him because he was gay," reads one headline. These articles graphically describe those three young murderers' hunt for a victim. Julio was the victim they found that night.

I have included the articles not to be sensational, but rather as proof for those who do not wish to acknowledge the need for antibias legislation.

I first met Julio when he was 9 years old. I knew Julio for 22 years. Julio's family always accepted his homosexuality. They never tried to force him to be what he was not. They allowed him to be what he was—a man who loved men. How cruel of strangers to come along and take him from us.

It does help that his murderers were apprehended and properly sentenced. But it hurts that New York State Republican senators continue to block passage of meaningful antibias legislation because of the inclusion of gays and lesbians as a protected category.

Our family does not wish to relive the horrible details of Julio's murder. We wish to return to our regular routines. But we owe a huge debt to the gay and lesbian community who brought about the apprehension of Julio's murderers and who stood by us throughout a difficult trial.

My husband Ted and I are committed to the passage of antibias legislation. We believe in the effectiveness of the criminal justice system because we have seen it work.

Today marks the second time that I appear before a body of legislators and offer testimony as the family of a victim of bias-related violence. Each time it is difficult because we are forced to reexamine the effects of the entire experience. Once again, we relive the news of Julio's death; the discovery of a clawhammer; the shocking realization that Julio's murder was a gay bashing; the frustration of pretrial hearings; the confrontations with the family of the defendants, the media, and the intense pressure.

You want to know how this process has affected our lives, but we resist examining the experience. That is how painful it is. Our family life was shattered. The daily schedule of our immediate family unit disappeared. Our daughter's life was threatened. Some family members were embarrassed that Julio was gay; many were uncomfortable with the publicity. They accused my husband Ted and me of exploiting the situation for our own gain. They felt we were looking for publicity.

We mention these things because it is important for this panel to know that the effects of one bias-related crime are far-reaching and encompass many people. I am here today to attempt to convey

to you the multitude of pain this crime has brought upon us. Put simply, our lives have been changed forever.

I am sure that many of you have experienced an event in your lives so significant that time becomes split into a before and after. The birth of a child will do this—life before children and life after children. Julio's murder is like that. We feel that our lives have been struck by lightning and the paths have been forever altered.

The effects of this crime continue to emerge. What I am trying to say is that this crime will affect our family's life for the rest of our lives.

Ted and I personally believe that many Americans are really unaware of the effect bias-motivated violence can have on a person and his or her family. We are not talking about the obvious physical damage inflicted during a hate-motivated attack. We are referring to the fear, the terror that one experiences when faced with passionate rejection because of what one is.

An absolute stranger looks at you and hates you. Hates you to the point of wanting to hurt you. The mere sight of you makes them so enraged that they attack you—not merely to hurt you, but to seriously maim and disfigure you. And in Julio's case, to kill you. And they usually delight in weapons of pain and terror.

Imagine facing three men armed with beer bottles, a claw-hammer, pipe wrench and kitchen knife. It is terrorizing. Imagine if it was your son or daughter, your spouse, your mother or father facing such vehemence.

Forgive me for being so personally graphic. God grant that you and your families never face such terror. But our brother did, and so have countless other brothers and sisters.

Julio Rivera was murdered because he was gay. We are not speculating about this: This is a matter of public record. Three youths decided to beat some people up, stretch some people out. They were looking for a drug addict, a homo or homeless person to "tune up." Dan Doyle confessed, "I killed him because he was gay."

The people of Queens County have acted responsibly. They convicted all three killers of the crime and each has been sentenced to the maximum penalty the law allows for the charges leveled against them.

We hope that our Federal legislators will follow the example of the people of the city of New York whose clear message says "this behavior is not acceptable."

We are very pleased the Federal Government is addressing the issue of bias-related violence on a national level. Your advocacy of meaningful antibias legislation sends a clear message to our State legislators who continue to procrastinate their support of this issue.

Thank you, Mr. Schumer, Mr. Sensenbrenner, and members of the Subcommittee on Crime and Criminal Justice, for the opportunity to testify and for acknowledging the urgency of the need to take action against hate-motivated violence.

I would be happy to answer any questions you might have for me.

Mr. SCHUMER. Thank you, Ms. Rivera.

[The articles submitted by Ms. Rivera follow:]

The New York Times

B1

Queens Man Describes Hunt For a Victim, Then a Murder

In Gay-Bashing Trial, Killer Admits He Instigated Violence

By JOSEPH P. FRIED

A Queens man took the witness stand yesterday to testify that he and two friends bussed through the streets of Jackson Heights on a summer night for "a drug dealer" in a mannequin suit, a home and a car, in a hunt that ended when he stabbed a man to death "because he was gay."

The man, 21-year-old Daniel Doyle, held the packed courtroom rapt as he described in a mannequin suit the events that led up to the death of Julio Rivera. His tale began at a party perched out in his family's home. It ended, he testified, in an ambush in a dark corner of a schoolyard with Mr. Rivera collapsing under a rain of blows from a hammer, a beer bottle and Mr. Doyle's knife.

Mr. Doyle, the son of a retired New York City police detective, is the prosecution's chief witness in the trial in State Supreme Court in Queens. But even as he detailed the crime to which he has pleaded guilty, he provided possible aid for the two defendants, Eric Brown, 21, and Earl Bici, 19.

The Gay Howard Beach Case

The courtroom was filled yesterday, the first of Mr. Doyle's testimony. Gay-rights groups have called the killing of Mr. Rivera, 29, the gay equivalent of the Howard Beach case, in which a black man was chased to his death by a group of whites.

Mr. Brown and Mr. Bici are charged with second-degree murder because prosecutors say they "acted in concert" with Mr. Doyle, whose knife thrust into the victim's back inflicted the fatal wound early on the morning of July 2, 1990. Like them, Mr. Doyle was also allegedly charged with second-degree murder, but he was permitted to plead guilty in August to the lesser crime of manslaughter in return for testifying against his friends.

They deny that they participated in what their lawyers say was a killing that only Mr. Doyle committed. All three men are from Queens.

Mr. Doyle said yesterday that Mr. Brown had lured the victim into an isolated corner of the Public School 89 schoolyard by pretending to "make him an offer for drugs and sex." He said that Mr. Bici, 19, had wielded the hammer and beer bottle.

But Mr. Doyle's testimony also provided material that the defense attorneys are expected to stress when they cross-examine him today and, later in the trial, when they make their arguments to the jury.

Mr. Doyle admitted that it was he who had instigated the violence, though he said that the other two had willingly joined him in the hunt for a victim and in the plot to lure and attack Mr. Rivera, whom they did not know, when they spotted him "coming around the corner" outside the schoolyard on 37th Avenue between 77th and 78th Streets.

'Street Some People Out'

When arguments and testimony began Wednesday, the defense lawyers said that their main theme would be that their clients were the innocent targets of prosecutors who, together with Mr. Doyle, had "fabricated" a false account incriminating Mr. Brown and Mr. Bici. They charged that Mr. Doyle was motivated to do this in a desperate attempt to avoid being convicted of murder himself, a conviction that would carry a sentence of 25 years to life. In return for his plea to first-degree manslaughter, he faces 2 and a third to 25 years in prison.

"I told him I would like to beat some people up, stretch some people out," the 6-foot 5-inch, 300-pound Mr. Doyle testified about a discussion he said he had with Mr. Brown about what they should do after the party at Mr. Doyle's Jackson Heights home had ended about 1 A.M. on the morning of Mr. Rivera's death. Mr. Doyle, who at the time was a student at Union College in Schenectady, N.Y. — an English major with a grade-point average of 3.4 out of 4, he said — was home for the summer.

He said Mr. Brown, a former student at the Art Students League in Manhattan, agreed to join him, and that Mr. Bici, who has held various part-time jobs since dropping out of high school, heard the conversation and also wanted to take part. In addition to a homosexual sex offer seller so

Killer Tells of Hunt for a Victim

Continued from Page B1

addict, he said, a homeless person was also considered a possible target, and before reaching the schoolyard the three found a crudely constructed shack near railroad tracks that a homeless person had apparently put up, he recalled.

When they found it vacant, he said, Mr. Brown "knocked down the stick with the hammer and set it on fire."

At the two defendants, slender young men, stared without expression at the friend testifying against them, Mr. Doyle said that Mr. Brown had been chosen to approach Mr. Rivera, a bartender from Jackson Heights, because Mr. Brown's shoulder-length hair at the time would make him seem less threatening than Mr. Doyle and Mr. Bici. At the time they had shaved heads, symbols of the downtown "shaved street gang," he said they had belonged to and were trying to revive.

Mr. Brown lured Mr. Rivera into the corner of the schoolyard, which Mr. Doyle said they knew as a hang-out for drug dealers and gay men. Then he and Mr. Bici appeared and "Bici cracked a do-sauce bottle over Rivera's head," causing him to "double over."

"What happened next?" Daniel McCarthy, the chief prosecutor at the trial, asked.

"Bici pulls out his hammer and starts hitting Rivera in the back with it," the witness said, describing the victim "ducking and weaving like a boxer."

Mr. Doyle said he then "pulled out my knife and stabbed him" and "punched him in the face and kicked him in the stomach."

Mr. Doyle did not say, however, that Mr. Bici had repeatedly pounded Mr. Rivera on the head as well as on the back with the hammer, nor did he say that Mr. Brown had hit him in the face with a wrench, as Mr. McCarthy had said in his opening arguments Wednesday.

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Gay-Bash Killing Testimony

Witness: 'I killed him because he was gay'

By Curtis L. Taylor

NEW YORK

The star prosecution witness in the city's first gay-bashing murder trial said yesterday that he and two other members of a street gang lured David Rivera to a Queens schoolyard and killed him because he was gay.

"We stalked him and killed him," David Doyle calmly told Queens Assistant District Attorney Daniel McCullough, "I killed him because he was gay."

Doyle, 21, has pleaded

guilty to manslaughter and agreed to testify against the two defendants now on trial, Erik Brown and East River Doyle.

Interview With Erik Brown, Page 21

Doyle will serve from 8½ to 25 years in prison. Doyle testified that on July 2, 1990 — the night Rivera was beaten with a wrench and claw hammer and stabbed — he, Doyle, held a "bitchfest" party at his Jackson Heights apartment earlier in the evening. Doyle said that it was during that party that he told East River about beating up somebody to get his scratched pants "Doc Marten Style" going again.

The prosecution has said that the three men were hooded associated with

a gang known as Doc Martens Skinheads, who target gay men and non-witnesses for violent assaults.

"I told Erik Brown I wanted to beat some people up — street men people out in the name of DMG," Doyle said. Brown, 21, and Ben, 19, are being tried for second-degree murder. The defendants allegedly went to a known gay "studying area" and lured Rivera to his death in a Jackson Heights schoolyard.

The trial in State Supreme Court in Queens has been watched closely by gay activists, who say Rivera's brutal slaying underscores the increasing

violence against homosexuals. Prosecutors and gay rights activists say this is the city's first gay-bashing trial. Doyle said he armed himself with a knife, while Ben grabbed a hammer and Brown a wrench, as they went into their Jackson Heights neighborhood to seek their prey.

The trio bought 40-ounce beers at a local convenience store before walking along the Long Island Railroad tracks near Roosevelt Avenue, Doyle testified. He said that Brown suggested that they go this route because "we might run

into somebody . . . maybe, a drug addict, a homosexual, or something" partner.

After knocking down an elderly woman by accident by a homeless person along the tracks, the three went to 15 69, a known drug and gay-cruising area, Doyle said.

"We were going to go down and look up a drug dealer, a user, a homosexual who was out cruising," Doyle said. After seeing Rivera come from around the corner, Doyle said they had because "most of the guys recognize skinheads and run."

"We decided we were going to jump him," Doyle said. "Brown went into the schoolyard and grabs Rivera on offer for drugs and sex."

But and Doyle then entered the schoolyard at 77th Avenue.

"He crushed a 40-ounce bottle over Rivera's head and he decided once," Doyle said describing the first blow. "I threw a bottle into the corner. . . It smashed, then they pulled out the hammer and started hitting him in the back. . . He was kicking and wanting like a boxer . . . then I pulled out my knife and stabbed him in the back. . . I punched him, kicked him in the stomach."



David Doyle

When they found it vacant, the jury, Mr. Brown "knocked down the shack with the hammer and set it on fire."

As the two defendants, slender young men, stared without expression at the friend testifying against them, Mr. Doyle said that Mr. Brown had been chosen to approach Mr. Rivera, a bartender from Jackson Heights, because Mr. Brown's shoulder-length hair at the time would make him seem less threatening than Mr. Doyle and Mr. Bici. At the time they had shaved heads, symbols of the dormant "skinhead street gang" that he said they had belonged to and were trying to revive.

starts hitting Rivera in the back with it," the witness said, describing the victim "ducking and weaving like a boxer."

Mr. Doyle said he then "pulled out my knife and stabbed him" and "punched him in the face and kicked him in the stomach."

Mr. Doyle did not say, however, that Mr. Bici had repeatedly pounded Mr. Rivera on the head as well as on the back with the hammer, nor did he say that Mr. Brown had hit him in the face with a wrench, as Mr. McCarthy had said in his opening arguments Wednesday.

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BODY:

The star prosecution witness in the city's first gay-bashing murder trial said yesterday that he and two other members of a street gang lured Julio Rivera to a Queens schoolyard and killed him because he was gay.

"We stabbed him and killed him," Daniel Doyle calmly told Queens Assistant District Attorney Daniel McCarthy. "I killed him because he was gay."

Doyle, 21, has pleaded guilty to manslaughter and agreed to testify against the two defendants now on trial, Erik Brown and Esat Bici. Doyle will serve from 8 1/3 to 25 years in prison. Doyle testified that on July 2, 1990 - the night Rivera was beaten with a wrench and claw hammer and stabbed - he, Doyle, held a "skinhead" party at his Jackson Heights apartment earlier in the evening. Doyle said that it was during that party that he told Esat Bici about beating up somebody to get his skinhead gang "Doc Marten Style" going again.

The prosecution has said that the three men were loosely associated with a gang known as Doc Martens Skinheads, who target gay men and non-whites for violent assaults.

"I told Erik Brown I wanted to beat some people up - stretch some people out in the name of DMS," Doyle said.

Brown, 21, and Bici, 19, are being tried for second-degree murder. The defendants allegedly went to a known gay "cruising area" and lured Rivera to his death in a Jackson Heights schoolyard.

The trial in State Supreme Court in Queens has been watched closely by gay activists, who say Rivera's brutal slaying underscores the increasing violence against homosexuals. Prosecutors and gay rights activists say this is the city's first gay-bashing trial.

Doyle said he armed himself with a knife, while Bici grabbed a hammer and Brown a wrench, as they went into their Jackson Heights neighborhood to stalk their prey.

The trio bought 40-ounce beers at a local convenience store, before walking along the Long Island Railroad tracks near Roosevelt Avenue, Doyle testified.

Nawsday, November 8, 1991

He said that Brown suggested that they go this route because "we might run into somebody . . . maybe, a drug addict, a homo[sexual], or homeless" person.

After knocking down an empty shanty erected by a homeless person along the tracks, the three went to PS 69, a known drug and gay-cruising area, Doyle said.

"We were going to go there and beat up a drug dealer, a user, a homo[sexual] who was out cruising," Doyle said.

After seeing Rivera come from around the corner, Doyle said they hid because "most of the gays recognize skinheads and run."

"We decided we were going to jump him," Doyle said. "Brown went into the schoolyard and made Rivera an offer for drugs and sex."

Bici and Doyle then entered the schoolyard at 77th Avenue.

"Bici cracked a 40-ounce bottle over Rivera's head and he doubled over," Doyle said describing the first blow. "I throw a bottle into the corner . . . It smashed, then Bici pulled out the hammer and started hitting him in the back. He was ducking and weaving like a boxer . . . then I pulled out my knife and stabbed him in the back . . . I punched him, kicked him in the stomach."

Doyle's testimony conflicted with some parts of the prosecution's opening statements which described Bici as striking Rivera in the head.

Doyle will be cross-examined by the Defense attorneys Harold C. Harrison and Paul Bladimer, representing Brown; and Barry Gene Rhodes, representing Bici.

GRAPHIC: Photo- Julio Rivera

Mr. SCHUMER. Mr. Bencivenga.

I know this is difficult for all the witnesses, particularly Ms. Rivera and Mr. Bencivenga. We appreciate your being here.

STATEMENT OF RALPH BENCIVENGA

Mr. BENCIVENGA. Good morning, Chairman Schumer, Congressman Sensenbrenner, and members of the Crime and Criminal Justice Subcommittee. I appreciate the opportunity to tell my story before you today. I only wish it were unnecessary for me to be here. But it is necessary.

My daughter Jennifer was and continues to be a victim of the heinous crime of rape, kidnaping, sodomy and racial hatred. As Martin Luther King, Jr., said in his letter from a Birmingham jail, "An injustice anywhere is a threat to justice everywhere."

Here is the story of my lovely daughter, Jennifer, 2 weeks away from her 16th birthday.

"Should we kill her?" tormented the driver of the stolen Camry as he pinned one of my daughter's legs to the floor while the other man forced himself upon her. "Please, no, I am a virgin," she pleaded. "Please don't do this to me."

But my daughter was told that she was the perfect white girl. And she was asked by these urban terrorists if she had ever kissed a black man before.

She protested and cried before being told to remove her clothing under the threat of being shot with a hidden gun. But then my daughter had already been emotionally raped. "Should we kill her?" were the words of the driver that echoed through Jennifer's mind.

When the act was finally over, she was followed. "If you go to the police or tell anyone, we will come back and kill your family." They threatened her by saying, "We know where you live."

The racist remarks made to my daughter during this attack caused me to alert the police, as well as the media, that this was a bias crime. I hoped that if this fact were made public, it would make it more possible to catch the criminals and prosecute them.

The police are few; the criminals are many. From day two, the police kept telling my family that they were waiting for a snitch, an informant, to come forward.

A month ago, I was interviewed by the FBI. It seems that the urban terrorists, as Mayor Dinkins calls them, have violated a Federal statute that protects children on their way to school.

Upon doing some research, I was told by one of the detectives that a Ku Kux Klan article was written about my daughter's case, and this alerted the FBI to involve themselves. I welcome the FBI's help at this juncture.

By the way, isn't this ironic, that the Ku Kux Klan pushed the FBI into a bias-related case? What must I do to get justice?

Think hard about how you might have felt if you had been in our shoes when my wife and I took our daughter for HIV testing.

I hoped going public with Jennifer's story from day one might change the system. I still hope that it may make a difference.

But please understand this. It has been agony for my daughter and my family. Indeed, I feel as though we have all been raped repeatedly since coming forward.

Jennifer fought courageously, but lost her physical virginity. She thought she would lose her life, and she could have.

We as a people cannot take a backseat attitude toward crime, especially hate crime. The police and the courts cannot do it alone.

There have been many crimes committed against my family in the past. The record is this: Police, 0; criminals, about 15.

We each must be as courageous as Jennifer was on that hateful day. We each must take a stand that this kind of hate and perversity is un-American and has no place here.

I would also like to say that it is time for this country to protect our families, because the family is the single most important unit if our society is to survive.

Thank you, Mr. Chairman, Mr. Sensenbrenner, for this opportunity to address the subcommittee. I would be happy to answer any questions you might have.

Mr. SCHUMER. I want to thank all the witnesses for going through what is obviously a difficult experience. I know, because I sat with Ralph several hours after the crime was committed against his daughter. I visited Rabbi Burg the day after his synagogue was desecrated. And I had the chance this morning to talk to Ms. Rivera. And we are all filled with many different emotions.

I would like to say, though, for the record, for everyone out there, maybe, somehow we particularly empathize with a crime that might have happened to us. If you are Jewish and go to a synagogue, maybe more with Rabbi Burg's crime. If you have a relative who is gay or are gay yourself, then with Ms. Rivera. If you have a young daughter and live in a community like Marine Park, more with Mr. Bencivenga.

But, Mr. Phillip, I really regret his not being here. Through our witnesses, we tried to show the universality of these hate crimes. Maybe he will show up a little later. I did speak to him Friday, and was certain he was coming. I don't know what happened to him. But just to reiterate, he bought a home in the Canarsie section of Brooklyn, and his house was burned because the people didn't want a black person on their block.

So it affects every one of us. And you can't say, "Well, that is that group, it is not me." It is all of us. That is the bottom line here.

Let me try to ask a few questions. This testimony, there is a Latin expression, it speaks for itself. "*Res ipsa loquitur*." They really do speak for themselves.

Let me first start with you, Rabbi, because you were first.

Just give us a little detail of the reaction of the congregation to the swastikas.

Rabbi BURG. The first person, after myself, who discovered the swastikas happened to have been a survivor of Auschwitz. I don't have to go into detail of what Auschwitz was, I am certain, and the simple comment was, "Oh, my God, again." I think that speaks for itself. It was a feeling of outrage, a feeling in this country, which is a democracy, that this can happen; a feeling of a spread from Church Avenue down Ocean Avenue, and it hit us.

It was a feeling that it is happening all over. That is why we called the community rally, and that is why we included everyone, including Father Guy Massey, who is the chairman of the Council

of Jewish and Catholics for the Diocese of Brooklyn. Every parish of our community was represented by the priest or the monsignor.

It cuts across all lines. It hurt us. But we understood it wasn't only us, that this is going after each and every person and each and every religion within our total community.

Mr. SCHUMER. Ms. Rivera, you had mentioned how the whole community rallied and helped apprehend the people who killed your brother-in-law, Julio. At what point did it become clear it was a bias crime? Tell us the details of that. Did you know right from the outset, or suspect right from the outset, that there were other witnesses? Just tell us a little about that.

Ms. RIVERA. It was not clear to my husband Ted and me or to the family that this was a gay bashing. It was clear to the gay and lesbian community it was a gay bashing.

Alan Sack, Julio's friend and former roommate, who did discover his body and held him, described to us the holes in Julio's head from which blood gushed, and later that day they found a claw-hammer. Actually, the custodian of the school found the claw-hammer. The crime was committed in a school yard. The police recovered it.

It still wasn't clear to Ted and me what was going on here. We were, of course, too overcome with grief and the arrangements of what goes on after something like this happens. The gay community knew immediately, though, and pursued it in that vein.

However, the crime was committed July 2, on a Monday, and it wasn't until November 1990 that District Attorney Santucci declared that he would prosecute this case as bias related.

The police did not follow suit until December 29, 1990 in declaring it a bias crime.

Mr. SCHUMER. Of course, one of the things we are finding with the Hate Crimes Statistics Act, it is difficult, first, to determine whether a crime is a hate crime. Often law enforcement is not, particularly in the smaller community, is not aware of what hate crimes are and it takes a while for them to classify them as that.

And finally for you, Ralph. Having known you for many years as a community leader, I want to first praise and salute your courage in doing this. You had to decide whether to go public or not, which is very difficult.

Can you tell us the reaction of the community, Jennifer, all of her friends and all of the people in the neighborhood? Just give us a little outline. They know the horrible thing that happened to her. What has been the reaction?

Mr. BENCIVENGA. The reaction in the community was one of outrage, one that immediately they started rallying to have Al Sharpton in the community. And I told them, upon hearing that they were rallying and committing all types of parades and what have you, that I will not stoop to the level of bigotry. I said that as outraged as I am, this hate crime has brought us all to the point where innocent people are getting hurt.

And my daughter came to me and said, "Make sure you speak to the mayor and thank the two black individuals that helped me, calling home." So I said, "OK, I will do that." I called Mayor Dinkins and he had me come to city hall to publicly thank these

people, because my community was outraged and they wanted revenge.

And I went before them and I said, "We are going to have a prayer of forgiveness and get this illusion of hatred out of our minds, because we are not going that route." And they were very supportive, the religious community, the congressional community that you sent down, were very supportive. They knew something had to be done, but they really didn't know what to do outside of show their anger in the streets.

Mr. SCHUMER. Which would have set off a new cycle.

Mr. BENCIVENGA. Yes. You didn't want that.

Mr. SCHUMER. Mr. Sensenbrenner.

Mr. SENSENBRENNER. Thank you very much. I have a couple of very quick questions and comments to make.

Ms. Rivera, can you just tell me what the sentence was that the three who were convicted of murdering your brother-in-law received? In your testimony it just says the maximum sentence. Not coming from New York, I don't know what that is.

Ms. RIVERA. One of the individuals confessed and testified against the other two. He was tried and found guilty of the charges of manslaughter in the first degree. He received 8½ to 25 years.

Mr. SENSENBRENNER. If I can interrupt, is that Daniel Doyle, the one who confessed?

Ms. RIVERA. That is correct. The other two defendants were Esat Bici and Eric Brown. They pleaded innocent to the charges of murder in the second degree. They were found guilty, and they received 25 years to life.

Mr. SENSENBRENNER. Why was this prosecuted as a second-degree murder rather than a first-degree murder? It seems to me there was an element of premeditation involved if they were going after your brother-in-law because he was gay.

Ms. RIVERA. You are correct on that, and I think the point is well-taken. However, they did not leave the house looking for Julio Rivera. As a matter of fact, the first object of their hatred was a shack on the railroad track, and they thought they would find a homeless person in there. Using the hammer that they had with them, they destroyed that shack and burned it to the ground. Had that person been in there, he or she would have been killed.

One would think that this would have been enough for them, that maybe it was out of their system. But, no, they continued on until they found another victim. They weren't satisfied that they hadn't found a victim yet. And then that was Julio.

So to answer your question directly, though, it would have been first-degree murder had they left looking specifically for Julio.

Mr. SENSENBRENNER. Thank you very much.

Rabbi Burg, let me make an observation. I am as flabbergasted at your statement that the first person who desecrated this synagogue didn't know what swastikas meant except that Jewish people didn't like them for some reason or another, as the fact that this occurred itself.

It seems to me that that is a great failure of our educational system, not to teach someone who is 15 years old enough of history to have an appreciation as to the horrors of the Nazi period in Germany.

Can you tell us a little bit about what is being done in this community so that 15-year-olds do know what swastikas mean?

Rabbi BURG. I can't answer for the individual schools. However, I do know that Community Board 15, as a result of the recent desecration, is now embarking upon a fellowship weekend, which will be this coming weekend. And a statement has been prepared by Father Catrone and Rabbi Greenwald which will be read in all the synagogues and all the churches throughout Community Board 15, in conjunction with the youth committee, to try to educate people.

Incidentally, this first incident with this 15-year-old was about 8 or 9 years ago. I called the school this boy attended and spoke with the principal. I volunteered—I said, I would like to meet with some of your classes and explain to them what a swastika is and what it means and what it does to a Jew, to a survivor of the Holocaust. He said he would take it under advisement. This was 8 or 9 years ago. I still haven't gotten a call back from him.

Mr. SCHUMER. Was this a public school?

Rabbi BURG. It was a private school. I know on various occasions many rabbis and priests and ministers do visit each other's respective synagogues. For example, next door we happen to house a school of 400 Russian youngsters from first grade through about seventh to eighth grades. It is a private school. These are the children who have come out of the Soviet Union, some of them as recently as 6, 8, 10 months ago. They are being taught. And if you want shepnaches, which means if you really want to feel good about something, take a look at these kids and you will see what education can do when they are learning what America is, who is in America, and they can compare it to the Soviet Union.

Education is the key, and it has to start in kindergarten, not when they are 15.

Mr. SENSENBRENNER. I agree with that, but kids who miss learning about this kind of thing until they are 15 or 16, or maybe 56 or 66, it seems to me that getting people's attention is really the key to getting a handle on this.

I look back 15 or 16 years ago when I was a member of the Wisconsin Legislature, and the American Nazi Party or some such group got a booth at the Wisconsin State Fair, which is held in the Milwaukee suburb, to basically promote their propaganda. And the Jewish community in Milwaukee came to me legitimately upset about this. Unfortunately, the State board said they were protected by the first amendment, and there is really not much we can do about it.

So I managed to get the Anti-Defamation League a booth right across the way from the Nazis. And we got films of the Holocaust that were sent to us from New York, and they ran just a constant video of the death camps and things like that. And within 6 hours after the counterdisplay started, the American Nazi Party folded their tent and their swastika flags and simply left after having paid for this booth.

I remember going out there when both booths were in operation for the short period of time, and there was a black man who was his mid-50's who I thought was going to have a heart attack because he was arguing vociferously with the Nazis saying, "I fought and almost gave my life in Germany to stop this kind of thing that

you are trying to perpetrate and to make sure that that flag never flies again anyplace in the world, and don't you know what happened there." And the kids in their brown shirts with their arm-bands on said, "No, we really didn't know what happened." But orders came from on high and there were no more Nazis at the State fair, again, because of the education campaign that was going on right across the way.

It seems to me that the way to prevent people from having bias related and thoughtless acts of desecration such as this that happened in your synagogue, is just to wake people up that what the Nazis stood for runs against everything that America stands for.

Rabbi BURG. I agree.

Mr. SENSENBRENNER. Thank you.

Mr. SCHUMER. Thank you, Mr. Sensenbrenner.

We in New York State have required in the public school curriculum that they teach about the Holocaust. In fact, that was a law I helped to pass when I was there.

I want to thank Rabbi Burg, Ms. Rivera and Mr. Bencivenga, and apologize to everyone that Mr. Phillip isn't here, but his entire statement will be added into the record if he would like to submit one.

It is difficult for you folks to come forward. Not easy. But for all the people who don't understand that this is real and affects lives, no other testimony can equal it. So we very much appreciate it. Thank you.

Ralph, say hello to your strong daughter for me.

Mr. SCHUMER. Our next panel is going to be Charles J. Hynes and Mr. Gary Stoops. We are going to do this panel a little differently, because District Attorney Hynes, who has been such a leader in this area, has a very tight schedule. I ask both witnesses to come forward, and we will first hear Mr. Hynes' testimony, ask him his questions, and then go on to Mr. Stoops.

So our next panel is led off by Charles J. Hynes. He is the Kings County district attorney. He has a great deal of experience with bias crimes, both as Brooklyn district attorney—unfortunately, we have too many bias crimes in Brooklyn directed against everybody—as well as in his previous position, where he gained a great deal of fame as State special prosecutor in the Howard Beach case.

I thank Mr. Hynes on behalf of the people of Brooklyn, whether they be black or white, Jew or Christian, for being a symbol of fairness and of the law doing its best to stop the kind of hatred that we see.

Mr. Hynes.

STATEMENT OF CHARLES J. HYNES, DISTRICT ATTORNEY, BROOKLYN, KINGS COUNTY, ACCOMPANIED BY DEPUTY DISTRICT ATTORNEY CHARLES POSNER

Mr. HYNES. Thank you, Congressman Schumer.

With me is Deputy District Attorney Charles Posner, who has been in the forefront of a lot of the programs we will be discussing this morning in our brief moments up here.

I am, of course, very pleased to testify before this Subcommittee on Crime and Criminal Justice. I see Congressman Sensenbrenner here. Thank you, Mr. Sensenbrenner, for accepting this invitation.

As the district attorney of Kings County and one who has spent most of my career in criminal justice, I can't imagine a more timely subject than the Federal antibias legislation you consider this morning.

As the chief law enforcement officer of the most populated and, sadly, the most violent county of New York State's 62 counties, and one responsible for prosecuting both the Howard Beach and Bensonhurst cases of racial violence, and now the most recent Crown Heights hate murder, it is the time for antibias legislation. It is long, long overdue.

The first Howard Beach prosecution was successfully completed some 4½ years ago. I really thought it would be a time for soul searching and reconciliation. To paraphrase the book of Ecclesiastes, it had been a time to kill and now it was a time to heal, there had come a time to break down and now had come the time to build up.

I spoke at many public gatherings both in this State and other parts of this country. Time and again I expressed the hope that the tragic death of one black man and the vicious beating of another would serve as a clear lesson of the senselessness of hate-induced violence. I repeated the theme that hate was a sickness as much as cancer and AIDS are a sickness, and that all of us had to work together to do something about that sickness or run the risk that one of our most precious values in our society, respect for the rights and freedoms of others, would be destroyed.

But in the summer of 1989, while I was campaigning for this office, I was shaken when a young black man—it is difficult to say "man," he is a youngster about 17 years of age—traveling from one part of Brooklyn to another to purchase a car, was attacked and killed by a group of other young men, solely because of the color of his skin.

This young man, like the other two in Howard Beach, had harmed no one, but was enjoying the civil right of a citizen of this country to walk freely on a public street with his friends. The people who attacked him were motivated solely by racial hatred.

Two years later, tragedy and violence visited the Crown Heights section, when a young scholar was murdered solely because he was a Jew. We have seen the spectacle of Jewish children having rocks thrown at them from a bus, having a white student being raped by two young black men because of her color.

In March of this year, the New York City Gay and Lesbian Anti-Violence Project reported that the number of attacks on gays and lesbians in 1991 increased significantly over 1990.

If some are skeptical and think bias is an aberration, how then do we respond to the verdict rendered in Los Angeles? How do we respond as a civilized society to the senseless killing of more than 53 people? How do we explain the loss of life and property and the spread of violence to other cities throughout United States after the verdict.

I don't think for a moment that the passage of any law can automatically change the hearts and minds of bigots who commit acts of hate-related violence. The sickness that causes one human being to hate another because of that person's race or religion or sexual

preference is something that only psychiatrists and social workers and members of the clergy can really answer.

I don't claim to be an expert on the working of the human mind, but I do know that sometimes society must send a strong message that certain kinds of conduct will not be accepted, and that that conduct will be severely punished.

It is time to send that message, very directly, to the people who commit these bias-related crimes. While I am a strong supporter of the proposed legislation to fight bias, I am not so naive, as I said before, to believe that this law would be a panacea to prevent future attacks.

We at the local level desperately need funds that are available in the Federal Weed and Seed Program. And, Mr. Chairman, and Mr. Sensenbrenner, I intend to be coming down with staff before your committee and dealing with your staff to try and explain a program that we have developed near Brooklyn, which we think presents a real opportunity to do something about the spiraling crime statistics.

Putting aside that for a moment, law enforcement alone will never be an answer to ending bigotry. When a person lies on the ground beaten or murdered simply because of the color of his or her skin or religion or sexual preference, damage has been done to our society as a whole. We have an obligation to ensure these crimes don't occur in the first place.

Ever since my election in 1989, I began planning for a program which we call community prosecution. It has three prongs to it. It is a very, very tough program against violent-related crime, and yet it looks for alternatives, such as a drug alternative to prison, and an educational component.

On September 19, 1991, this county, which is one of the largest prosecutorial offices in the Nation, reorganized along community lines. Brooklyn is a municipality of some 2½ million people. We divided it into five geographic prosecution zones, a prosecution team was assigned to each of the geographic zones, and prosecute all felonies coming out of those zones. So instead of dealing with a county that has 70 square miles, each of these zone prosecutors deal with an area normally 10 or 15 square miles.

We have prosecutors attend regularly scheduled community meetings at the local planning boards, at the police precincts. We have them dealing with police commanders, coming up with strategies against particular crime patterns in the community, and we have to deal with neighborhood organizations.

Now, after almost 8 months, the program is beginning to achieve the goals established. We have prosecutors working much more closely with police officers who make the arrest. Prosecutors, who in the past needed to spend time familiarizing themselves with the locals, are now spending more time in other valuable pursuits. Prosecutors are now familiar not only with the streets of the neighborhoods in their zones, but also the problems in the streets.

The second approach is to do something about a drug problem which has gone out of control, and should have long been realized that it was a public health problem rather than a criminal problem. And so what we have done is, we have isolated out nonviolent

drug offenders who, under New York State's second felony offender law, would have a mandatory jail sentence of 2½ to 4 years.

We have excluded from the program anyone who sells drugs who is not addicted and anyone who has any kind of violence in his or her background. If you have committed a violent crime, you are not eligible for this program.

And what we do is take these addicts, take them out of the criminal justice system and into drug rehabilitation and treatment at an incredible difference in cost. Over an 18-month period it costs approximately \$1.8 million for every 100 people as compared to \$6 million for incarceration which ultimately ends up with a revolving justice that puts people back on the streets unrehabilitated.

The third program is Project Legal Watch, and it is a program that has already achieved national recognition and \$1 million grant from the Bush administration. We send district attorneys, detectives, paralegals, and other support staff from my office into the elementary schools in this county. No kid who has gone through this program will ever have to ask what a swastika is. This program is designed to raise the consciousness of our children to the horrors and self-destructiveness of bigotry and bias, and tries to make kids understand that the drug road inevitably leads to death.

We are working now on 121 elementary schools, that is private, parochial and public, with nearly 6,000 children, and by the end of my term, which is 1993, we will be in every one of Brooklyn's 350 elementary schools. We mean to bring an end to hate-related violence and bring an end to drug abuse.

I am also pleased to tell you that the district attorney of San Francisco as well as the district attorney of Onandaga County, which includes Syracuse, has adopted our program.

We would like to see this program in every urban area of the United States. Can you imagine what is going to happen to children who are taught the horrors of drug abuse and the self-destructive nature of bias-related crime, if we can have so many of these kids throughout America in the last few years, in this decade, involved in this program.

As a lawyer, in closing, I have come to believe that without education we will never be able to convince the people who serve that the law protects all of us equally regardless of race or religion or sexual orientation. Members of the committee, the proposed legislation you consider today is an important step in the recognition that bias is a separate element of a crime and ought to be treated as such and ought to be punished as such.

With the committee's indulgence, I respectfully ask that you accept the rest of my statement for the record.

Thank you very much.

Mr. SCHUMER. Without objection.

Thank you, Mr. District Attorney.

[The prepared statement of Mr. Hynes follows:]

REMARKS OF DISTRICT ATTORNEY CHARLES J. NYER
HEARING ON FEDERAL BIAS LEGISLATION
MAY 11, 1992

Good morning Congressman Schumer and ladies and gentlemen. Thank you for giving me this opportunity to speak on behalf of H. R. 4797, which increases the federal sentences for persons who commit hate crimes. Although I am honored to be your guest today, I am deeply saddened that 26 years after the federal civil rights act was passed it is necessary for you to consider this legislation.

I cannot imagine a more timely subject than the hate crime legislation that you are considering today. Little over one month ago I testified at the New York State Legislature before the Criminal Justice Committee of the Black and Puerto Rican Legislative Caucus. I urged the State Legislature to adopt Governor Cuomo's anti-bias legislation, which would make it a crime to violate someone's civil rights by injuring them or killing them or destroying their property because of their race or religion or ethnicity or sexual orientation. I hope that positive action by Congress on H. R. 4797 will send a message to our State Legislature that the Nation wants hate crimes legislation that specifically mentions the type of bias involved in the crime.

As the chief law enforcement officer of this State's largest and most violent county, and as the person responsible for prosecuting the Howard Beach, Bensonhurst and Crown Heights cases, I can tell you from painful personal experience that the time for strong hate crimes legislation is long overdue.

When the first Howard Beach prosecution ended four years ago, I thought that it would be a time for soul searching and reconciliation. To paraphrase the Book of Ecclesiastes, it had been a time to kill, and now it was a time to heal, it had been a time to break down and now it was a time to build up. I was invited to speak at many public gatherings and my views on race relations were widely sought. I expressed the hope that the tragic death of Michael Griffith, and the senseless beating of Cedric Sandiford, two African-American men whose only crime was to walk down a public thoroughfare at 12:30 at night looking for a subway station, would serve as a lesson that nothing could be gained from bigotry or racial violence. The Howard Beach case caused great pain to the families of the victims, the families of the defendants, and, indeed, to the entire City of New York. I hoped the Howard Beach case would serve as a warning to everyone that crimes of hate can only cause misery to all.

In the Summer of 1989, my faith was shaken when another African-American young man, who travelled from one part of Brooklyn to another part of Brooklyn to purchase a car, was attacked and killed by a group of other young men solely because of the color of his skin. This young man, like Michael Griffith and Cedric Sandiford before him, had harmed no one and had been enjoying his right as a citizen of the United States to walk freely on a public street with his friends. The people who attacked him were motivated by pure racial hatred - there is no doubt that this was their intent when they surrounded and killed Yusef Hawkins.

And two years later, almost to the day, in the Crown Heights section of Brooklyn, another young man, Yankel Rosenbaum, was killed, solely because he was a Jew.

In March of this year, the New York City Gay and Lesbian Anti-Violence Project announced that the number of attacks on gays and lesbians that were reported in 1991 increased by 16 percent over 1990.

Now, just two weeks ago, in what may have been the most publicized allegation of police brutality in history, we saw the acquittal of four police officers in Los Angeles. The video taped recording of the beating of Rodney King probably was seen more times and by more people than any single piece of film in history with the possible exception of the Zapruder film of the assassination of President Kennedy. As you know, in the wake of the acquittal, full scale rioting broke out in Los Angeles. As a result at least 55 people were killed there, over 2100 people were injured and property damage is estimated to be well over a billion dollars. I guess it is not surprising that the riots spread to other cities, and it is also not surprising that those riots caused additional deaths, injuries, and property damage. I take pride in the way Mayor Dinkins provided leadership to prevent violence here.

The number of bias incidents that we hear of each day reminds me of a line from Shakespeare's Hamlet: When sorrows come, they come not single spies, but in battalions.

Over the next few weeks and months, all of us, prosecutors and legislators alike will be called upon to explain not only what

happened in California, but to defend our system of justice. In particular, we will be asked whether the jury system retains validity. I am not satisfied that the usual pronouncements will work - presumption of innocence, burden of proof and the like. Clearly, we are obligated to search for answers that make sense to acknowledge that our justice system needs improvement.

We must deal with the reality contained in the question: Can any black citizen anywhere in this country believe that justice was administered fairly in California? And sadly, it does not matter what the truth is, it is the perception that society must deal with. You, as legislators, and I, as the chief law enforcement official of Brooklyn, surely understand that the answers to these problems cannot be found on the streets of our cities.

When a person lies on the ground, beaten or murdered simply because of the color of his or her skin, or religion, or sexual orientation, critical damage has been committed to society at large. When a person scrawls a swastika on the walls of a synagogue or firebombs the home of innocent people it is a sickness which only psychiatrists, social workers, members of the clergy and other specialists in the fields of human behavior can attempt to understand.

As a law enforcement officer, I do not claim to be an expert on the workings of the human mind, but I do know that sometimes society must send a strong message that certain kinds of conduct are totally reprehensible and will be severely punished. And it

is time that we sent that message to individuals and groups who commit hate crimes.

Crimes that are motivated by hatred for another person's race or religion or sexual orientation involve an additional wrong to society that should be recognized as separate and distinct from the underlying homicide or assault or arson. Under federal law, it is already a crime to violate a person's civil rights by causing death or physical injury. By raising the sentencing penalties for hate crimes by at least three offense levels, H.R. 4797 will give the federal judges an opportunity to show the haters and bigots that when they commit other crimes motivated by hate, their crimes will be not be business as usual, but will be severely punished.

But, I do not think for one moment that simply raising the federal offense levels for hate crimes can automatically change the hearts and minds of the bigots and haters who committed these despicable acts.

It has become strikingly apparent that we, at the local level, must have funds from the federal "Weed and Seed Program", permitting us to weed out those who continually molest our community and seed, or provide funds, for those ideas which will prevent future criminal conduct.

Urban prosecutors who daily handle hundreds of criminal cases have wrestled for years with the problem of providing justice to the citizens of our cities. Unlike small towns in America where individual prosecutors are familiar with the crimes and criminals of their communities, today's crushing volume of cases in urban

areas has made it difficult for prosecutors to become familiar with and understand the crime problems of the huge number of people whom they serve. Prosecutors cannot represent a rule of law within their communities unless they find a better way to understand and respond to the sources of crimes and disorders in their communities. We, as law enforcement officers, and you as legislators, have an obligation to create programs which is innovative. I believe that in Brooklyn I have started a three-pronged program.

The first prong of the program which I have created is called Community Focused Prosecution. On September 19, 1991, my Office, one of the largest prosecutorial offices in the nation reorganized along community lines. Brooklyn, an county of almost 2 1/2 million people, was divided into five geographic prosecution zones. A prosecution team, consisting of a bureau chief, two deputy chiefs, and twenty-four lawyers, was assigned to each zone, and given the responsibility for prosecuting felonies which occurred in that zone. Assistant District Attorneys who previously prosecuted cases spanning the entire area of Brooklyn now focus on a particular area. Rather than trying to understand the problems of crime which exist in a population of almost 2 1/2 million people, covering an area of over 70 square miles, these prosecutors now serve approximately four hundred thousand to five hundred thousand people in an area of ten to fifteen square miles. In addition, they regularly attend community meetings at local planning boards, police precincts, and neighborhood associations.

This reorganization is designed to coordinate with the new community policing initiative of the New York City Police Department. We recognize that if police officers walked regular beats and become closer to the community, prosecutors who handled the arrests made by these officers must also become closer to and better understand the problems of these communities.

After just seven months, this program is already achieving many of the goals which had been set. Prosecutors who, in the past, required hours to familiarize themselves with various locations throughout Brooklyn to prepare cases, now know the streets of the neighborhoods of their zones and the problems that exist on those streets. In effect, the assistants are no longer responsible for a large, amorphous county, but, instead, represent smaller, defined communities. My Office has taken a large, ponderous system and made it smaller and more responsive to the people it serves.

I believe that my Community Focused Prosecution program requires an additional expansion and reorganization of my Office to prosecute misdemeanors and to present cases to the grand jury. For the same reasons that assistants assigned to felony cases are assigned to zones, those assistants assigned to try misdemeanors and make grand jury presentations should also be assigned to zones. Instead of handling cases based on random assignment, assistants should be assigned to one of the five trial zones to handle those cases which occur in those zones. The success of my Community

Focused Prosecution program requires its expansion to all phases of the prosecutorial effort.

Prosecuting the guilty is not enough. President Kennedy was correct when he said, "In a time of turbulence and change, it is more true than ever that knowledge is power." We must reach out to the young people early on to head off the infection caused by the bacteria of hatred. A vital second prong of my program in Brooklyn is the education of our young people. Since the Howard Beach case in 1987, I have learned that more answers to our problems of racial hatred will be found in our classrooms, not our courtrooms.

So, beginning in September 1990, shortly after I became District Attorney in Brooklyn, I implemented an educational program called Project Legal Lives to promote racial harmony and understanding. Assistant district attorneys, detectives, investigators, paralegals, and secretaries work in fifth grade classes of Brooklyn's elementary schools - public, private, and parochial - 10 hours a month for the entire school year. Our staff teams with the teachers of those fifth grade classes to help the children understand the tragedy that awaits them in drug use and to help them recognize the stupidity of bigotry.

Let me give one idea of our lesson format. The class is called "Best Friends." In the class the students are shown a video tape of Tanisha, an African-American girl, and Jane, a white girl. They are sitting together. They describe that they are the best of friends; that they have known each other since grade school and

that they do everything together. They are about to begin junior high school and they are very excited. They talk on the video tape about the first night before school: where they will meet, what outfits they will wear, what they expect to discuss the following night. Tanisha says that she picked Jane up that morning and that they walked to school together. When they arrived, Jane says they separated and went to their classes, but that they planned to meet for lunch. Tanisha says that when she and Jane sat together during lunch they received many hostile looks from the other students. They cannot understand what was happening or what they have done wrong. Jane attributed the bad looks to being new in the school. She says that after lunch the two decided that they still would meet outside after school.

The tape shifts to Tanisha alone. She says she arrived outside first. She walked to the side of the school building to wait for her friend. While waiting, a group of African-American girls approached her and told her that she "better stop hanging out with that white girl." Tanisha says that she became outraged and said, "No, she's my best friend." The girls jumped Tanisha, pushed her down, and beat her up.

The tape shifts to Jane. Jane says that as she was walking down the stairs from her third floor class, a group of white girls approached her and said, "Stay away from that black girl." Jane told them, "No way!" and tried to walk past them. But the girls grabbed Jane and cut her hair. Jane says that she was in tears as she ran out of the building.

The tape shifts back to Tanisha who says she was also on the ground and crying. They were about twenty feet from each other and their eyes met. But they were frozen, they continued to stare at each other, and they did not move.

My staff member will ask a series of questions about this incident; some legal, some attitudinal. He or she will ask if any crimes have been committed against Tanisha and Jane, whether school officials have broken any laws, when Tanisha and Jane have done anything wrong. In addition, my staff member will ask whether Jane and Tanisha should continue to be best friends. Will they remain best friends, and what could be done to solve the problem.

The responses of the fifth graders to these questions are remarkable. Frequently, the fifth graders begin to play various roles as to how the problem could be worked out; playing the parts of the parents, principal, Tanisha and Jane. We have found this lesson to be particularly effective because fifth graders do not see a difference in race or religion among themselves. They are more interested in having good and true friends. They are quite concerned that friendships might be destroyed on the basis of racial hatred and bias.

Last year, the program operated in 58 schools. This year, we have been able to expand to 128 schools working with 6000 children. By the end of 1993, I expect to have members of my staff in every one of Brooklyn's more than 350 elementary schools. My educational program has already received national acclaim. Last August, Arlo Smith, the District Attorney of San Francisco announced that, with

our help, he will establish the same program for his county. Similar efforts have begun in Syracuse, New York. My hope is that by the end of the decade the program will be found in every city in this country.

Think of the impact that we can have on this generation of children and the children of this generation's children if they are patiently taught the destructiveness of bias and the dangers of drug use.

The expansion of Project Legal Lives would mean that all assistant district attorneys in my Office would be assigned a fifth grade class to work with during the school year. To coordinate Project Legal Lives with my Community Focused Prosecution program, attorneys and staff in the program would be assigned to a school located within their zones. This assignment by "zone" will increase the staff's understanding of the community's crime program through interaction with the children of the community.

An additional prong of my program is called DTAP - Drug Treatment Alternative to Prison Program. In October, 1990, following ten months of researching the available data on drug treatment and rehabilitation, the Brooklyn District Attorney's Office began to identify 100 non-violent drug offenders and, with the cooperation of the courts, removed them from the criminal justice system to two highly respected residential drug rehabilitation centers, Daytop Village and Samaritan Village. To qualify for this program, not only must the pending criminal offense be non-violent but the defendant must have no violent crime

in his or her background. The defendant must waive the right to a speedy trial and must agree to random and repeated drug testing.

Our drug treatment alternative program begins for most of the participants with 45 days at a local jail where the inmate is carefully monitored. The others are sent directly to rehabilitation to set up a controlled model for comparison. The next phase is 16 to 18 months at Daytop or Samaritan Village. During the final or re-entry phase we have established a committee to identify housing available away from the defendant's original environment. Our program contemplates a two to three month rental subsidy for these people. Finally, our Business Advisory Council made up of Brooklyn business leaders attempts to provide job training and placement to offer stability during re-entry and to assist in the final stage of out-patient counselling. Since the inception of the program 118 of the defendants (71 percent) who entered are still in treatment. Those who dropped out have been re-arrested, indicted and imprisoned. For those who successfully complete the program, my Office will dismiss the pending case.

To give you some idea of the potential of this program: It is generally accepted that to feed their habit, 100 addicts commit an average of ten crimes a week; crimes like auto theft, vandalism, burglary and shoplifting. There are many narcotics detectives who say that this figure is too conservative and that addicts commit an average of thirty crimes a week. But if we assume the lower figure, ten crimes per week, then these 100 people commit 50,000 crimes per year.

In addition, the eighteen month cost of the program is \$1.8 million dollars. I am not saying that the program is inexpensive. But it is inexpensive when it is compared to the 5 1/4 million dollars it would take to house these people in prison for the same eighteen months.

Expansion and coordination of my OTAP program with my Community Focused Prosecution program would be highly beneficial to the local communities within Brooklyn. For example, when a beat officer receives information about an individual who is selling drugs to support his drug habit, that officer will work with attorneys assigned to the appropriate trial zone to target the seller for a "buy and bust" operation as opposed to simply passing the information along to narcotics investigators. Once arrested, the individual, if he or she meets the guidelines of the program, will be offered DTAP treatment. Resources, rather than being focused generally, will center on those individuals who are causing the largest amount of crime and disorder within the community.

In a large urban setting, the programs I have described to you may be the most effective way to improve the delivery of prosecutorial services and to increase safety in the community.

I submit that programs such as these require federal financial assistance as part of the government's effort to combat crime. Federal funds which have been set aside for law enforcement should be used to support innovative local programs which have the best potential of preventing all of those crimes - drugs, bias, guns - which have plagued our community.

In closing I would like to say that we must fight hate crimes with vigorous prosecution and the strong penalties proposed in H.R. 4797. But we must never lose sight of the need to heal and the need for love. As Dr. Martin Luther King, Jr., once wrote: "We have learned through the grim realities of life and history that hate and violence solve nothing. They only serve to push us deeper and deeper into the mire. Violence begets violence; hate begets hate; and toughness begets a greater toughness. It is a descending spiral, and the end is destruction - for everyone. Along the way of life, someone must have enough sense and morality to cut off the chain of hate by projecting the ethics of love into the center of our lives."

I pray that we do not forget that this is our ultimate goal. Thank you and God bless you.

Mr. SCHUMER. As always, whenever you testify, either here or in Washington, it is extremely well thought out, well articulated, brief, having not only a great deal of intellectual content but also appeal to everybody.

I also want to add my accolades to your deputy, Charles Posner. He does a great job, and we have actively worked on bias crimes together.

You mentioned the enhanced penalties. As Mr. Stoops will testify later, we are having some trouble getting the States to collect and to send us hate crimes statistics. The Hate Crimes Statistics Act, of course, was intended to collect the statistics so we know the depth of the problem. It also encourages local law enforcement by proving that the problem does exist.

How difficult is it to determine whether a crime is a bias crime? In certain instances, such as the one that is right outside on the synagogue wall, it is clear; in others, it is less clear.

Mr. HYNES. You are right. In certain cases, it is palpably clear. If someone committing a crime of violence uses some epithet that describes a sexual orientation, I think that becomes a question of proof during the course of the trial in chief.

The more subtle forms of hate-related violence I guess will raise the kind of questions that Congressman Sensenbrenner said at the outset, and I am happy to hear that that is part of the consideration for the committee.

But we face a particular problem in our State. We have an assembly that is ready to pass an antibias piece of legislation, which chiefs of police, district attorneys, the president of the New York State District Attorney's Association, James Hadon, have testified in favor of, many of the big city district attorneys have testified in favor of, and yet we can't get certain members of the New York State Senate to pass the legislation. And it is related solely and exclusively to one thing. They refuse to sign their names to a piece of legislation that protects another class of people in our society, gay and lesbian people.

And I don't want to say that it is cynical. A lot of the members of the State senate I know well. They just can't bring themselves to recognize that there is a class of people that have to be protected. So for me it is a very, very important step forward, that the Federal Government is prepared to have legislation which will do something that we have not been able to get the State senate now to do for 4 or 5 years.

Mr. SCHUMER. Do you find there is more resistance or less resistance in a community when this seems to be a bias crime? Or is there no clear, set rule?

Mr. HYNES. I can tell you that in the Howard Beach case, right from the very beginning, our detectives, the New York City detectives who were assigned to the case did a magnificent job in finding three white residents of Howard Beach. One woman in particular, a woman named Theresa Fisher became the linchpin case, because her voice was heard on a 911 tape, screeching into the tapes, "For God's sake, get cops here right way. They are going to kill this guy."

In the Bensonhurst case, I am sad to say, although I wasn't district attorney when that case occurred, shortly after becoming dis-

strict attorney I reviewed all the detective reports, and it was sad to see we weren't getting the kind of cooperation from the folks in that area of Brooklyn. That is not a condemnation of Bensonhurst at large. It is a condemnation of people who just didn't care who happened to be living on that block.

Mr. SCHUMER. After the Howard Beach case I heard talk, that the guy was really just a criminal, looking to commit a crime.

Mr. HYNES. That has been said that about Catholics in northeast Ireland since I was a little kid. They told me if—they would just consider that the Irish are a different class of people who do a lot of complaining along with their drinking.

I said in my summation in the Howard Beach case: Please don't misunderstand, Howard Beach is not on trial; these defendants are on trial.

Mr. SCHUMER. Jim.

Mr. SENSENBRENNER. Thank you very much.

I just want to be very brief. I can see the point in determining whether a crime is a hate crime or not is something that is entirely subjective, and to try to graft a definition of whether a crime is a hate crime is something that we can't do legislatively because each case has got to stand or fall on its own particular facts.

But let me ask you a question, because we do have the hate crimes reporting law that has been the law for almost 2 years now. What factors would make your office determine whether or not to report a crime as a hate crime under this law?

Mr. HYNES. I established the first civil rights bureau in the history of our office, and they are obligated to assess every crime in the county which has some racial or religious or sexual orientation base. And as I said to the chairman, some acts are palpably clear; the use of language, the use of a sign which is particularly offensive to a class of people.

It is a fairly uncomplicated thing for us. It becomes more complicated when there is no language used. It becomes more complicated when you and I both know, you know, given our time on this planet, that someone has been attacked because of a difference, and yet we can't prove it because there isn't language.

Mr. SENSENBRENNER. As a prosecutor, Mr. Hynes, if the bill that we are considering today passes—and I grant you it is a Federal bill, but there is similar State legislation pending in Albany—do you think that attempting to get a conviction for a hate crime, which would necessitate your proving an additional element beyond a reasonable doubt in the minds of 12 jurors, whether that is going to make it more difficult to obtain a conviction on the underlying base crime or not?

Mr. HYNES. I don't think so. I have been a trial lawyer on both sides of the well for most of my career. I was the chief trial attorney in that case, the Howard Beach case. But I will tell you this, Mr. Sensenbrenner. We made a calculated judgment not to charge a civil rights violation in that case because the punishment was a misdemeanor and we were dreadfully concerned, terrified, if you think about it, as we analyzed this case, that a jury might compromise its verdict and acquit on the underlying charges and convict only on civil rights.

So I make a careful appraisal of cases understanding that that may be a reality. That is why I think it is so necessary that our State senate ultimately join with the assembly in passing this statute that would enhance the penalty for a bias-related incident.

Mr. SENSENBRENNER. Thank you very much.

Mr. HYNES. If I could just correct the record, Congressman, you had some concern about murder in the first degree. In our State you can be convicted of murder in the first degree only if it is a correction officer murdered by someone in prison. Murder in the second degree is our premeditated murder charge.

Mr. SENSENBRENNER. That is another strange law in New York.

Mr. SCHUMER. Now you see why it is so difficult for us to pass things.

Mr. HYNES. In response to his comment about the Braves beating the Dodgers, "We was robbed."

Mr. SCHUMER. Thank you, Mr. District Attorney. We very much appreciate it. Thank you for taking the time.

Our second witness, who was kind enough to allow Joe Hynes to go forward, is a representative of the FBI, Mr. Gary Stoops. He is the Deputy Assistant Director of the Bureau's Information Management Division. He will be updating us on the status of the data collection under the Hate Crimes Statistics Act.

Mr. Stoops, your entire statement will be read into the record, so you may proceed as you wish.

**STATEMENT OF GARY L. STOOPS, DEPUTY ASSISTANT DIRECTOR,
INFORMATION MANAGEMENT DIVISION, FEDERAL BUREAU OF
INVESTIGATION, U.S. DEPARTMENT OF JUSTICE**

Mr. STOOPS. Good morning, Congressman Schumer and members of the subcommittee. I appreciate the opportunity to testify before this subcommittee.

My objective is to provide you the current status of the FBI's implementation of Hate Crime Statistics Act provisions.

Congress passed the Hate Crime Statistics Act in 1990. The act mandated that the Attorney General acquire data concerning crimes that manifest evidence of prejudice based on race, ethnicity/national origin, religion, or sexual orientation, including, where appropriate, the crimes of murder, forcible rape, robbery, aggravated assault, simple assault, burglary, larceny-theft, motor vehicle theft, arson, intimidation, damage, destruction or vandalism of property.

The Attorney General tasked the FBI's uniform crime reporting program with the development of a data collection program for its 16,000 voluntary law enforcement agency participants.

The FBI, having anticipated the act's passage, had thoroughly studied the issue and determined a new and different approach was necessary to be successful in development and implementation of a national hate crime statistics program. Of primary concern was to avoid placing major new reporting burdens on contributing law enforcement agencies.

To address this concern, two decisions were made at the outset of the program's design. First, the hate crime collection would be an adjunct to the UCR collection. Hate crimes are not separate, distinct crimes, but rather traditional offenses motivated by the of-

fender's bias. For example, an offender may commit arson because of his or her racial bias.

It was therefore not necessary to create a whole new crime category. To the contrary, hate crime data could be collected by merely capturing additional information about crimes already being reported to UCR.

Second, the types of bias motivation to be reported would be limited. There are, of course, many kinds of bias. Some of the more common are those named in the act. But there are also biases against rich people, poor people, men who have long hair or beards, smokers, drinkers, etc. The types of bias reported to the FBI would, however, be limited to those mandated by the enabling act; that is, prejudice against a race, religion, or sexual orientation or ethnic group.

Because of the difficulty of ascertaining the offender's subjective motivation, bias would be reported only if investigation revealed sufficient objective facts to lead a reasonable and prudent person to conclude that the offender's actions were motivated in whole or in part by bias.

With the cooperation and assistance of some of the law enforcement agencies already collecting hate crime information, such as the Maryland State Police, the Baltimore County, Maryland Police Department, the Chicago Police Department, the New York City Police Department and the Boston Police Department, and a broad coalition of human interest groups, a system and guidelines for hate crime data collection within these established parameters were developed. Included in the collection was information about the types of prejudice motivating the designated offenses, where hate crimes occur, and their victims and offenders.

Reporting law enforcement agencies are offered various means by which to report, either in conjunction with their regular UCR submissions or separately in quarterly hate crime reports.

The hate crime statistics program has been endorsed by the International Association of Chiefs of Police, the National Sheriffs Association, the UCR Data Providers Advisory Policy Board, the International Association of Directors of Law Enforcement Standards and Training, and the Association of State UCR Programs. These endorsements were crucial to the successful implementation of the program, for without law enforcement's voluntary data collection and support, the effort would be doomed to failure.

The UCR Program has conducted 14 regional training conferences nationwide for local law enforcement agencies regarding the investigation and reporting of hate crimes. The participants of these sessions included all the 50 States being represented, and the District of Columbia, including all law enforcement agencies serving populations over 100,000. These latter agencies represent approximately 77 percent of the U.S. population. Training for Federal agencies was also conducted at this time.

The FBI has begun receiving submissions of hate crime data from a number of law enforcement agencies across the country, and initial indications are implementation of the program will move rapidly. As with all national data collection efforts, however, participation must grow considerably before valid nationwide assessments of the hate crime problem can be made.

In the interim, the FBI, the Bureau of Justice Statistics and the Association of State UCR Programs are jointly preparing a resource book containing available 1990 hate crime data from the States and local agencies operating hate crime programs that predated the Hate Crime Statistics Act. This publication will also contain other useful information relative to State-specific hate crime legislation and strategies.

Future FBI publication plans include an annual publication focused solely on hate crime, along with topical studies highlighting unique aspects of hate crime occurrences. While the Hate Crime Statistics Act expires after 5 years, the FBI considers the statistics collection a permanent addition to the UCR Program.

National hate crime statistics will result in greater awareness and understanding of the true dimensions of the problem nationwide; and that, in turn, will result in further benefits. Law enforcement will be able to better quantify their resource needs and do a better job of directing available resources to the areas where they will have the most effectiveness.

Historically, law enforcement has demonstrated progressive, professional competence in developing imaginative approaches to criminal problems. With its response to the hate crime legislation, law enforcement is showing that same enthusiastic, proactive attention to not only the criminal problem but a societal scourge that has even more adverse consequences. Throughout the country, law enforcement is being applauded, and rightly so, for its forthright addressing of this critical issue.

A report that I am submitting to the subcommittee today provides an up-to-date status report on the progress of the hate crime program implementation on a State-by-State basis. As you will see, the report identifies the State level agency that serves as the UCR State program administrator in 42 States, the number of law enforcement agencies within each State, and the number of agencies known to be already participating in the hate crime program.

The report specifically addresses within each State those agencies covering populations of 100,000 or more. The comments portion of the report briefly describes each State's plans, commitment, timeframes for implementation. The FBI generally supports those States having defined, realistic plans calling for reporting by 1993. Where plans call for later implementation or where no plans exist, the FBI will work directly with the law enforcement agencies in the State as we do in the eight States not having State-level UCR Programs.

It should be noted that startup times are somewhat more lengthy for those States planning to incorporate hate crime data in their National Incident Based Reporting Systems (NIBRS) than for those States settling for hard-copy reports. The FBI believes, however, that if the projected timeframes are for NIBRS implementation, the increased detail and reliability will more than adequately compensate for the wait.

Thank you. I will be happy to respond to any of your questions. Mr. SCHUMER. Thank you, Mr. Stoops.

[Additional information submitted by Mr. Stoops follows:]

STATE BY STATE
HATE CRIME IMPLEMENTATION
STATUS REPORT
MARCH 1992

STATE AGENCIES	NUMBER OF AGENCIES	NUMBER REPORTING HATE CRIME	SUBMISSION MEDIUM	AGENCIES 100,000+ POPULATION	100,000+ POPULATION PARTICIPATING	COMMENTS
Mr. Larry Wright Director Alabama Criminal Justice Information Center Attention: Teresa Ford 138 South Court Montgomery, Alabama 36130	300	0	N	Birmingham Huntsville Mobile Montgomery Jefferson County Mobile County	No No No No No No	Alabama has included the hate crimes category in its Uniform Crime Reports and will include hate crimes reported within the state in its NIBRS submissions. Alabama is submitting NIBRS data to the FBI annually. Additional training and discussion with the law enforcement agencies is being conducted. As with other states, hate crimes in Alabama are not being reported. The state department and concerns on the part of law enforcement in participating in the Hate Crime Program. This will be addressed by the state Program and the FBI in time and resource permit.
Mr. Pete Davis UCR Program Director Uniform Crime Reporting Section Department of Public Safety Information System Attention: Nancy Malzer 5700 East Tudor Road Anchorage, Alaska 99507	34	0	HCD	Anchorage State Police	No No	The Alaska state Program has stated to the FBI that they are already unable to coordinate hate crime data collection at the state Program. Therefore, the FBI will be able to collect hate crime data from agencies with law enforcement and liaison in time and resource permit.
Ms. M. E. Peters Project Administrator Uniform Crime Reporting Arizona Department of Public Safety Attention: Lynn Allman Post Office Box 6638 Phoenix, Arizona 85005	98	0	HC	Glendale Mesa Phoenix Scottsdale Tempe Tucson Maricopa County Pima County	No No No No No No No	The state legislature passed hate crime legislation last year which requires data collection beginning 1/1/92. Hate-crime reporting has been conducted and quarterly reports are being submitted to the FBI. Arizona agencies will submit hard copy reports to the state Program which will be forwarded to the FBI. Of the major agencies, Phoenix is currently collecting hate crimes, but as of the cutoff date 1/1/92, no report have not been received by the FBI.

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Mr. Gary Lopez Director Uniform Crime Reporting Program 394 Colony Street Meriden, Connecticut 06450	108	108	HC	Bridgport Hartford New Haven Stamford Waterbury Connecticut State Police	Yes Yes Yes Yes Yes Yes	Connecticut has joined the Crime Program vigorously and has conducted state-wide hate crime training.
Captain John W. Ford, Jr. Director State Bureau of Identification Attention: Connie Moore Post Office Box 430 Dover, Delaware 19901	56	56	N	New Castle P.D. New Castle State Police	Yes Yes	Delaware has provided training to all significant law enforcement agencies. Hate crime reporting criteria are set forth in the state manual which are forwarded to every police officer, and annual hate crime lectures have been rescheduled.
Inspector David W. Bolstrom Data Processing Division Metropolitan Police Department 300 Indiana Avenue, N.W. Washington, D.C. 20001	3	1	HC	Metropolitan Police Dept.	Yes	The Metropolitan Police Department has provided extensive training to hate crime reporting procedures and is prepared to begin reporting activities (1/87). Hate crime reporting is required by statute, D.C. code has had hate crime data collection standards. A two-tier level system is in effect within the Metropolitan P.D.

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Mr. Alan Shumakura Administrator Uniform Crime Reporting Program Crime Prevention Department Department of the Attorney General State 303 Vineyard Street 322 South Vineyard Street Honolulu, Hawaii 96813	4	0	HCD	Honolulu	No	Illinois has joined in UCR Program approximately as an attempt to improve reporting. At this time, the state Program is unable to participate in hate crime data collection. The FBI will deal with the law enforcement agencies within the state separately. The state Program plans to enter the hate crime collection effort by 1991.
Mr. Lonnie Gray Department of Law Enforcement Criminal Identification Bureau Attention: Doug Wood 6902 Corporal Lane Boise, Idaho 83704	98	98	HC	Boise	Yes	Idaho has provided an additional response to hate crime data collection efforts.
Mr. James Bushnell Assistant Bureau Chief Bureau of Identification Illinois Department of State Police Attention: Karen Reader 726 South College Street Springfield, Illinois 62704	708	708	N	Chicago Peoria Rockford Springfield Joliet Cook County DuPage County Lake County Will County	Yes Yes Yes Yes Yes Yes Yes Yes Yes	Mandatory hate crime reporting among the Illinois police agencies became effective 1/1/92. Previously, hate crime data was submitted to the Illinois state Program on a voluntary basis. The state Program will police agencies across Chicago will convert to NIBRS in early 1993. The Illinois Criminal History Training Unit has provided hate crime training to every police agency.
Indiana (No state Program)	337	1	HCD	Evansville Fort Wayne Gary Indianapolis South Bend Allen County Marion County	No No No No No No No	The state of Indiana has no state Program. The FBI will be dealing with law enforcement agencies directly and training will be conducted as time permits.
Mr. Carroll L. Buller Director Iowa Department of Public Safety Attention: Pam Malley Wallace State Office Building Des Moines, Iowa 50319	225	157	N	Cedar Rapids Des Moines	No Yes	State-mandated collection became effective 1-1-91 with all data reported through NIBRS. Access to NIBRS is provided for all 225 law enforcement agencies. 157 have been back submission programs certified or are using the available on-line or paper submission programs. Reporting for 1992 is expected to be significantly higher than in 1991.

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Mr. James E. Malon Director Kansas Bureau of Investigation Attention: Allan Haverkamp Criminal Justice System Administrator 1630 Southwest Tyler Street Topeka, Kansas 66612	337	2	HCD	Kansas City Overland Park Topeka Wichita	No No No No	The Kansas KCR Program has decreased activity and will not be included in the reporting of NHTSIS at which time it will be included in the NHTSIS format. However, NHTSIS is not expected to be implemented until 1994. Since this delay is unacceptable, the FBI will work with local law enforcement in Kansas to submit direct collections.
Major Neal Brittain Kentucky State Police Information Services Branch Attention: Captain Tommy Fields 1250 Louisville Road Frankfort, Kentucky 40601	488	1	HCD	Lexington Louisville Jefferson County	No No No	The Kentucky state Program has advised the FBI that they have been given no information regarding effective 7/1/92. The state Program is in the planning process. The FBI intends to provide assistance in implementing a state-level hate crime collection effort.
Louisiana (No state Program)	175	8	HCD	Baton Rouge New Orleans Shreveport State Police Jefferson Parish St. Tammany Parish	No No No No No No	Hate crime training for Louisiana scheduled for April 1992. Discussion with state representatives regarding formation of state Program will be conducted.
Mr. Stephan A. Bunker Supervisor Uniform Crime Reporting Division Station #42 36 Hospital Street Augusta, Maine 04333	178	0	HC	(None)		The state of Maine has substantially developed plans to begin hate crime reporting effective January 1992. The Maine state Program has coordinated its efforts with law enforcement and business organizations and has been advised that the data will be submitted most probably on hard copy and will be converted to NHTSIS upon the final passing of training procedures. Maine confidently projects 100 percent participation in the hate crime data collection effort by June 1992.

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Mrs. Ida J. Williams Director Central Record Division Maryland State Police Department 1201 Reisterstown Road Pikesville, Maryland 21208	131	131	HC	Baltimore Anne Arundel County Baltimore County Frederick County Harford County Howard County Montgomery County Prince Georges County	Yes Yes Yes Yes Yes Yes Yes Yes	Maryland state Program has been a pioneer and sustained leader in hate crimes data collection.
Mr. Dan Bihel UCR Program Manager Criminal History Systems Board 1010 Commonwealth Avenue Boston, Massachusetts 02215	392	39	D	Boston Lowell Springfield Worcester	Yes No Yes No	Massachusetts, though having no mandatory reporting requirement, has been active in collecting hate crime data. Since January 1978, the state has provided specialized and refined hate crime training for law enforcement with an UCR training program. The two largest reporting agencies (Boston and Springfield) represent agencies which cover 40% of the crime volume of the state.
Mr. Julie Allen Uniform Crime Reporting Section Michigan State Police Attention: Debra McClung 7159 Harris Drive Lansing, Michigan 48913	676	0	N	Ann Arbor Detroit Flint Grand Rapids Lansing Livonia Warren Warren Kent County Oakland County Washtenaw County Washtenaw County	No No No No No No No No No No No No	Michigan has a mandatory reporting for hate crime effective 3/1/97. Ultimately, hate crimes will be collected and reported through the UCRIS format. However, the Michigan state Program plans to begin hate crime data collection in early 1997 as a voluntary endeavor. Michigan state Program has substantially increased hate crime data collection efforts.
Mr. Ken Benfield Director Office of Information Systems Management 395 John Ireland Boulevard St. Paul, Minnesota 55155	291	291	HC	Minneapolis St. Paul	Yes Yes	Minnesota has a state-wide collection effort and all agencies are participating. Efforts are being made to convert data from the state hate crime reporting system into FBI requirements. The FBI is assisting in this effort.
Mississippi (No state Program)	213	4	HCD	Jackson	No	Mississippi does not have a state program, and direct collection efforts are being made by the FBI. No formalized training has been conducted or planned as yet.

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Missouri (No state program)	301	13	HCD	Independence Kansas City St. Louis Springfield Jefferson County St. Louis County	No No Yes Yes Yes No No	Missouri does not have a UCP state program, and the FBI is collecting directly from law enforcement agencies. The FBI has provided training for 110 police agencies and others training is planned for another 50 agencies.
Mr. Robert Liffing Statistical Analysis Montana Board of Crime Control 303 North Roberts Helena, Montana 59620	93	0	N	(None)		Montana plans to implement hate crime reporting requirements along with NIBRS which is predicted to be in early 1993. Until then, most likely the FBI will attempt to directly collect from law enforcement agencies. The FBI is currently working with the state to implement the hate crime effort already.
Mrs. Marilyn Keelan Uniform Crime Reporting Section The Nebraska Commission on Law Enforcement and Criminal Justice Post Office Box 94946 Lincoln, Nebraska 68509	256	0	N	Lincoln Omaha	No No	The state UCR Program intends to begin hate crime collection along with NIBRS commencing in June 1993.
Nevada (No state program)	33	1	HCO	Las Vegas Reno	Yes No	Nevada not being a state UCP Program will be trained by the FBI during routine training sessions and hate crime data added to the direct UCP collection format.
Mr. Karen Lamb Uniform Crime Report Supervisor Division of State Police 10 Hazen Drive Concord, New Hampshire 03305	130	0	N	(None)		The state UCP Program plans to include hate crime collection in NIBRS which is intended to commence in early 1993.

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Sergeant Fred Madden Unit Head Uniform Crime Reporting Division of State Police Post Office Box 7068 West Trenton, New Jersey 08628	561	561	HC	Elizabeth Jersey City Newark Paterson	Yes Yes Yes Yes	New Jersey has seriously pursued hate crime collection efforts. They are made at the time, however, to submit Zero reports which means that it is unknown at the FBI whether or not there are any hate crimes and has no hate crime incidents to report or whether they are not participating. This issue is being addressed jointly between the New Jersey Program and the FBI. In view of statutory requirements, the state Program is not at all active in participating. Hate crime numbers have been provided throughout the state, and county prosecutors are also involved with hate crime training.
New Mexico (No state Program)	105	1	HCD	Albuquerque New Mexico State Police	No No	The FBI will incorporate hate crime training in its regular curriculum within the state of New Mexico and establish direct reporting from New Mexico law enforcement agencies.
Mr. Richard A. Rosen Chief Statistical Services New York State Division of Criminal Justice Services Executive Park Tower Saratoga Plaza Albany, New York 12203	543	120	D	Albany Amherst Town Buffalo New York City Rochester Syracuse Yonkers Essex County Montgomery Nassau County Queens County Saratoga County Suffolk County	Yes Yes Yes Yes Yes Yes Yes Yes Yes Yes Yes Yes Yes Yes	The New York state Program has made great efforts in obtaining voluntary compliance among law enforcement agencies. The contributing law enforcement agencies encompass the majority of the state's population. The New York state Program has been included in the police agencies from 1989 to the present. Agencies are submitting hate crime data to the state Program via hard copy. The state Program and the FBI are working out procedures for field transmission to the UCR Program.
Mr. William C. Corley Assistant Director SBI/DCI Attention: Doug Kappler 407 North Blount Street Raleigh, North Carolina 27601	681	0	HC	Charlotte Durham Greensboro Raleigh Winston-Salem Buncombe County Cumberland County Forsyth County Onslow County Wake County	No No No No No No No No No No No	FBI training has been given to the five largest police agencies. Presently, the North Carolina state Program is not collecting any data, but plans are being made for the future. The program is not yet active and will be able to produce Zero reports. The state legislators approved a two-year grant for the development of a hate crime training curriculum to be provided by the State Justice Academy. North Carolina will submit data via hard copy.

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Mr. Robert J. Helen Criminal Justice Training and Statistics Division Attorney General's Office Attention: Vicki A. Reader P. O. Box 1054 Bismarck, North Dakota 58102	93	0	NA	(None)		North Dakota is not collecting hate crime data due to a lack of resources. However, the upcoming Justice Research Advisory Committee will discuss the feasibility of collecting these data. The FBI will collect directly should a state plan not be derived.
Ohio (No state program)	535	29	HCO	Albion Cincinnati Cleveland Columbus Dayton Toledo Hamilton County Montgomery County Stark County	No Yes No No No No Yes No No	There is no state program in Ohio. The FBI will be conducting hate crime training during the course of routine UCR training and maintain direct collection from Ohio agencies that are not yet participating.
Mr. Raymond Pasuti UCR Section Supervisor Oklahoma Bureau of Investigation Suite 300 6600 North Harvey Oklahoma City, Oklahoma 73116	281	7	HC	Oklahoma City Tulsa	Yes Yes	Six hate crime schools have been conducted during 1991 by the state UCR Program. Additional agencies are expected to start hate crime data collection in early 1992.
Mr. Lloyd A. Smith Manager Law Enforcement Data System Oregon Executive Department Attention: Ray Spomer 155 Cottage Street, N.E. Salem, Oregon 97310	252	252	HC	Eugene Portland Salem Clackamas County Lane County Washington County	Yes Yes Yes Yes Yes Yes	Oregon developed a mandatory hate crime reporting program in October 1989. Hate crime training is provided by the Bureau on a bi-annual basis. The training is mandatory for all law enforcement agencies collecting the collection of hate data.

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Major Joseph Blackburn Director Bureau of Research and Development Pennsylvania State Police Attention: Mr. Cary Robinson 1800 Elmston Avenue Harrisburg, Pennsylvania 17120	1,157	1,157	HCD	Allentown Erie Philadelphia Pittsburgh Chester State Police Westmoreland State Police	Yes Yes Yes Yes Yes Yes	Pennsylvania Hate Program intends to include hate crime reporting in NIBBS submissions. In Pennsylvania, the Bureau of Community Services, within the State Police, is the official state repository for hate crime statistics. These data are routinely provided to the Pennsylvania Human Relations Commission. The Bureau of Community Services does have a Training Coordinator who has been involved in the development of the Hate Crime Program. It is the process of providing hate crime training to police cadets. It is projected that in the future such training will be provided to all municipal police agencies, as well as the State Police. Through the training, it is hoped that the Pennsylvania State Police and Human Relations Commission provide routine statewide hate crime training.
Lieutenant Arnold H. Biscione, Jr. Rhode Island State Police Post Office Box 185 North Scituate, Rhode Island 02857	45	45	HC	Providence	Yes	Rhode Island is developing a plan to include hate crime training in the state Police's officer academy. Hate crime training is being conducted by the state Police on a report basis and future assistance is expected to be requested from the FBI. Hate crime admissions began in 1992.
Lieutenant Gerald W. Hanby South Carolina Law Enforcement Division Attention: Marshall Todd Post Office Box 21398 Columbia, South Carolina 29221	265	1	N	Anderson County Charleston County Greenville County Lexington County Richland County Spartanburg County	No No No No No No	South Carolina plans to include hate crime data in NIBBS submissions during 1993. State-wide hate crime training by the state Police will be conducted at the time submission deadline software is more complete.
Mr. Donald G. Brekke Director South Dakota Statistical Analysis Center Attention: Anita Oehlerting c/o 550 East Capitol Avenue Pierre, South Dakota 57501	103	0	N	Sioux Falls	No	The South Dakota Program is including hate crime information in the NIBBS format. Hate crime training during May 1992, and will submit submissions in Year 1992, commence in January 1, 1993.

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Tennessee (No state program)	286	2	HCD	Chattanooga Knoxville Memphis Nashville Knox County Shelby County	No No No No Yes No	The FBI will be conducting state-wide training and will be collecting data directly from law enforcement agencies.
Mr. Ben L. Kyser Crime Records Division Uniform Crime Reporting Bureau Texas Department of Public Safety Attention: Charlene Cain Post Office Box 4143 Austin, Texas 78765	855	724	HC	Abilene Amarillo Arlington Austin Beaumont Corpus Christi Dallas El Paso Fort Worth Garland Houston Irving Lubbock Mesquite Pasadena Plano San Antonio Waco Bexar County Fort Bend County Harris County Hidalgo County Montgomery County	No No Yes Yes Yes No Yes Yes No Yes Yes Yes Yes Yes No No No No Yes Yes Yes	The Texas Hate Crime Program began collecting hate crime data in January 1992. Currently the program is collecting data from 855 law enforcement agencies. The Texas Hate Crime Program is included in the mandatory system. Also, Texas is currently preparing to publish a "Hate Crime Data Collection Guide" which includes guidelines for trainers to use in training police officers. Response in Texas is excellent and the program has demonstrated the credibility of the data collected and continues to focus on training to meet the needs of law enforcement agencies. The state of Texas has a mandatory hate crime reporting law.
Mr. Daryl Peterson UCR Specialist Uniform Crime Reporting Utah Department of Public Safety 4501 South 2700 West Salt Lake City, Utah 84119	114	0	N/HC	Salt Lake City Salt Lake County	No No	The Utah legislature passed a hate crime bill in February 1991. The collection is currently being implemented. The Utah Hate Crime Program representatives plan to conduct their own training for all police agencies prior to the implementation date.

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Major Law Marshall Support Services Commander Vermont Department of Public Safety Attention: Lieutenant Richard Boyden Post Office Box 189 Windsor, Vermont 05676	50	0	N	Vermont State Police	No	No central reporting for hate crimes has been established in Vermont so that the state Program will include hate crimes in NIBRS which is not anticipated to be completed until January 1993. Training of law enforcement is back in progress and just prior to NIBRS implementation.
Lieutenant John R. Quinley Records and Statistics Division Department of State Police Attention: Norma Poole Post Office Box 27472 Richmond, Virginia 23261	407	407	ST	Alexandria Arlington Chesapeake Hampton Newport News Norfolk Portsmouth Richmond Virginia Beach Chesapeake County Fairfax County Henrico County Prince William County	Yes Yes Yes Yes Yes Yes Yes Yes Yes Yes Yes Yes Yes	Virginia is incorporating hate crime reporting within its NIBRS Program. The FBI has provided hate crime training to the largest police agencies and state field agencies. The Virginia state Program has taken positive measures to ensure the collection of hate data. Presently, Virginia cannot distinguish those agencies and reporting from those with no hate crimes to report. The state Program believes, however, that all agencies are participating.
Ms. Bev Iken Project Director Uniform Crime Reporting Program Washington Association of Sheriffs and Police Chiefs Post Office Box 826 Olympia, Washington 98507	217	211	HC	Seattle Spokane Tacoma Clark County King County Kitsap County Pierce County Snohomish County Spokane County	Yes Yes Yes Yes Yes Yes Yes Yes Yes	The Washington state Program has been subordinate in its implementation of hate crime reporting and hate crime information and eventually is included in the NIBRS submission.

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Trooper S. G. Midkiff Uniform Crime Reporting Program 723 Jefferson Road South Charleston, West Virginia 25309	299	0	N	Kanawha County	No	West Virginia has crime submissions with the FBI as part of NIBRS, which is reported to the FBI by the FBI's Uniform Crime Reporting Program. The FBI's Uniform Crime Reporting Program is the only submission medium which will be conducted in cooperation with NIBRS submissions. Currently, about 100 submissions are being included with other reports during routine training throughout the state by state troopers and FBI personnel.
Mr. Jerome D. Lacke Executive Director Office of Justice Assistance Attention: Tom Evensen 2nd Floor 222 State Street Madison, Wisconsin 53703	292	146	HC	Madison Milwaukee	No Yes	In Wisconsin approximately half of the police agencies collect hate crime data. About the same number of police agencies have received hate crime training in the past year. The FBI's Uniform Crime Reporting Program is the only submission medium which will be conducted in cooperation with NIBRS submissions. Currently, about 100 submissions are being included with other reports during routine training throughout the state by state troopers and FBI personnel.
Mrs. Kathy Kirby Uniform Crime Reporting Representative Criminal Justice Information Section Division of Criminal Investigation 3106 West 22nd Street Cheyenne, Wyoming 82002	69	0	N/HC	(None)		State Program plan will incorporate hate crime reporting in NIBRS which is anticipated to commence in August 1992. Hate crime data is currently being submitted to the FBI by the FBI's Uniform Crime Reporting Program in August 1992.

Key to Submission Medium

HC = Hard Copy through State Program
HCD = Hard Copy sent direct from reporting agencies
NT = NIBRS tape trailer
ST = Summary tape trailer
N = Included in NIBRS format
D = Floppy disk through state Program
NA = Not applicable

Submission Column is current vehicle used for submissions. Any future plans to use a different submission medium may be noted in "Comments" column.

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Mr. SCHUMER. I want to say I appreciate the FBI's efforts in implementing the hate crime statistics legislation. It is one of the first things I passed as chairman of the Criminal Justice Subcommittee.

I understand that these programs take a little time get up and running. Yet, I had hoped we would be further along in the collection of the data than we are at this point. So I would like to discuss with you some followups in terms of speeding up the process.

First, participation for the States and local law enforcement is voluntary. Should we consider making reporting mandatory? Is it feasible? What other suggestions would you have for expediting and ensuring bias crime reporting?

Mr. STOOPS. Mr. Chairman, I think historically the UCR Program has been voluntary in nature, and it dates back to 1930, and we seem to have a pretty good record of cooperation from law enforcement. I think we need to have an appreciation for some of the tight budgetary constraints that both the State and local level and Federal level are experiencing. And I think that these combined with it, makes it very hard in some instances for some of them to get it under way right away.

Mr. SCHUMER. That is another question I have. I would not want to impose additional costs on the locals without reimbursing them for it. I think there are 13 or 11 States that are not participating at all—

Mr. STOOPS. Sixteen States.

Mr. SCHUMER. Sixteen. How much more difficult would it be for some of these States to participate?

Mr. STOOPS. I think some of them, if I could summarize, in 1992, out of those 16 States, eight of them will be coming on line with reporting. And there are three more States coming on in 1993. Then in 1994 we have two others.

Hawaii, it moved its UCR Program organizationally to improve reporting, so there is a little down time there, and we are going to work directly with the local law enforcement people. Then we have the remaining three States that are just financially unable—Alaska is one of those, but we are providing training to the local law enforcement in an effort to get as much collection we can. We have North Carolina as well as North Dakota, and they lack resources.

Mr. SCHUMER. So you think, aside from those three States, within a couple of years we will have data from all the States?

Mr. STOOPS. Yes.

Mr. SCHUMER. That is good news. It also appears, aside from getting the data from the States, that some of it is spotty. What can be done to ensure the uniform reporting from each city and State? Would it make sense to have centralized reporting from each State? Would that be advantageous?

Mr. STOOPS. There is no doubt that centralized reporting would be helpful, but it appears at this time it is best we get the support of the States as well as law enforcement in those States to provide this data. And it means that we are going to have to get out there and sell this to the locals, because we are limited on the number of people we have to make the coverage.

We have trained probably in excess of 1,800 people since the act was passed. We have incorporated training not only into the FBI Academy for our new agents, onboard agent personnel, as well as

our people attending the National Academy and the National Executive Institute. So it means we have got to educate our people about this, and what the benefits are that we are going to derive from it.

Mr. SCHUMER. I noted both in your testimony and in the law enforcement bulletin on hate crimes that the FBI puts out, you stated that hate crimes are motivated by the offender's bias. That is exactly how we have structured the Hate Crimes Sentencing Enhancement Act.

I know that you and the FBI are constrained from commenting on support of legislation, but I would hope that you would pass that along to your Justice Department overseers. I won't say taskmasters.

Let me ask you this. How much has the FBI spent on implementing the statistics act so far? It is not a lot of money, I presume.

Mr. STROOPS. The UCR Program, I guess to put it in proper perspective, is a \$4 million a year program. And it has taken a good bit of redirecting of both personnel and nonpersonnel resources to do this, because we are not that blessed with a lot of resources.

That is one of the reasons why I think we might not have moved along as quickly as possible, because of the fact that we were limited in what we can do throughout the country on this.

Mr. SCHUMER. Finally, there is some talk of including hate crimes in the national crime victimization survey. That turns up about twice as much crime, as you know, as is reported by the police. Not casting aspersions upon the police, a lot of people are victims of crime and don't bother to report them, for a variety of reasons.

Would it pay to add bias crimes to the victimization survey? Why did the Justice Department decide to use UCR alone instead of using the victimization survey, as well, to document bias crimes?

Mr. STROOPS. Regarding why we have the implementation, I guess it is the mission that we have with UCR dealing with law enforcement, and we have this dating back to 1930, whereas the Bureau of Justice Statistics has a different mission.

Mr. SCHUMER. I wouldn't want to take it away from you, because one of our purposes is to sensitize law enforcement to bias crimes. The question is, should we augment it by also including it in the victimization survey.

Mr. STROOPS. I think it would be very helpful because we need the view from victims as well as law enforcement agencies, because we have to view the national crime victimization survey as complementary to the uniform crime reporting.

The thing that I would only suggest is that because of the different methods in collection and so forth, that it would be very important, I think, in the questions that are asked of the people in this survey, that they use the same type of questions that we have adopted for use in the UCR hate crime reporting. I think it would be more meaningful.

Mr. SCHUMER. We are going to take up that suggestion with the Bureau of Justice Statistics.

Finally, last question, what about the collection of successful prosecutions of bias crimes? In other words, now we are beginning to get a handle on how many actual crimes have been reported.

What about how many have been prosecuted and prosecuted successfully? Would it make sense to try and collect that kind of data as well?

Mr. STOOPS. Well, as you know, what we are collecting right now under the act is very limited to those factors, but there is something we are considering doing, possibly a special survey later on to go in and find out some of the key indicators. It would help us in our training program.

I think that the thing that we would like to make note of is, in our training, we go into the psychology of prejudice with all our people on this. I think it is very important to do that. And we even have people now following up where they want to build in sensitivity training for law enforcement officers, both for victims of this type of crime as well as victims of all types of crime, so we have a better understanding to deal with them.

Mr. SCHUMER. Again, Mr. Stoops, let me thank you for your help on this issue. I know your assistant Mr. Chandler is here, and he has done a very good job as well. We thank you, Mr. Chandler. I appreciate your forthright answers.

Mr. Sensenbrenner.

Mr. SENSENBRENNER. I have no questions, especially since the chairman has a 12:20 speech. I don't want him to be late for that.

Mr. SCHUMER. Thank you, Mr. Stoops. We very much appreciate your appearance here.

Mr. SCHUMER. Now we will call our final panel forward. We have four people on our final panel. Our fourth panel consists of representatives of four groups that are active in the area of bias crimes.

First is Dr. Michael Riff. He is the associate director of the Regional Office of the Anti-Defamation League, a group I am very active with and know they do a great job. I appreciate your coming.

Next is Ms. Kristian Miccio, founding director of the Sanctuary for Families, Inc., Center for Battered Women's Legal Services. She also serves as chairperson of the Board of the New York Coalition of Battered Women's Advocates.

Our next witness is Mr. Howard Katz. He is the bias bill coordinator for the New York City Gay and Lesbian Anti-Violence Project, and an expert on antiviolenence statistics.

And finally, Ms. Elizabeth OuYang, staff attorney, Asian-American Legal Defense and Education Fund.

I have read your statements that have been submitted, and they will be entered into the record, so you don't have to read the whole thing into the record, if you don't want to.

We have a 5-minute rule which we haven't strictly adhered to because we have been moving along, but if it stops moving along, I will have to invoke it.

Dr. Riff, you are first. Thank you for coming.

**STATEMENT OF DR. MICHAEL A. RIFF, ASSOCIATE DIRECTOR,
NEW YORK REGIONAL OFFICE, ANTI-DEFAMATION LEAGUE**

Mr. RIFF. Good morning. Thank you, Representative Schumer and Representative Sensenbrenner, for allowing us to testify this morning.

My name is Michael Riff. I am here in my capacity as associate director of the New York regional office of the Anti-Defamation League.

For almost 80 years, the ADL has been one of the most respected human rights organizations in the country. I was also glad to hear that Representative Sensenbrenner had contact with our office. I suppose our Chicago office.

Mr. SENSENBRENNER. That was the New York office.

Mr. RIFF. Oh, you were in contact with us in New York.

Mr. SENSENBRENNER. I got the A team in there.

Mr. SCHUMER. Which always comes from New York, I might say. Now we are even.

Mr. RIFF. On behalf of ADL, I am therefore pleased to have the opportunity to declare our support for the Hate Crimes Sentencing Enhancement Act of 1992, and commend Representative Schumer and Senator Simon for their leadership in introducing this measure. We are grateful to the House Criminal Justice Subcommittee for having the opportunity to present testimony on this all-important subject.

Hate or bias crimes are an increasingly serious problem in our society. They not only have a special emotional and psychological impact on individuals and communities, but carry the potential for tearing apart the fabric of our society through escalating violence and turmoil.

Unfortunately, we see that all too often. And we as New Yorkers are painfully aware of the everyday reality behind these words. We need only think of the recent murders of Yusuf Hawkins, Julio Rivera and Yankel Rosenbaum. All three met their deaths because of naked bigotry.

In our city and State, hardly a week goes by without our reading in the press or seeing on television yet again the pain and anguish experienced by bias crime victims and their families and communities.

ADL's 1991 audit of anti-Semitic incidents revealed that New York State yet again led the Nation in harassment of Jews, threats against Jews, and vandalism of Jewish institutions and property.

Government must do more to address directly the painful consequences of bigotry. The ADL believes that the enactment of new hate crimes legislation would not only provide an additional important tool for law enforcement, but would also enhance the deterrent value of the law. More importantly, a clear signal would be sent to society that acts of bigotry will not be tolerated.

ADL's support for the enhancement of penalties for hate crimes at the Federal level is a logical extension of our efforts to enact similar legislation at the State level. Here in New York, for example, we continue to urge the State senate to join the assembly in passing the bias-related violence or intimidation act.

In addition to increasing penalties for crimes that are bias motivated by creating a new criminal offense called bias-related violence or intimidation in the first degree and in the second degree, the bill could establish a systematic statewide method of data collection.

The latter reporting section of the bill is meant to dovetail with the Federal Hate Crimes Statistics Act of 1990. In requiring the

U.S. Attorney General to acquire data on crimes which manifest prejudice based on race, religion, sexual orientation or ethnicity, the bill is intended to provide government and law enforcement with an assessment of the scope of the problem of bias crime so that appropriate resources can be allocated to redress it.

While we are encouraged by efforts at the Justice Department, the FBI and our own New York State Division for Criminal Justice Services, as well as many local police forces in gathering and analyzing data under the Hate Crimes Statistics Act, we know from experience that compliance will not be as complete as it should be until accompanying State legislation is enacted. At the same time, we pledge our continuing support for efforts to implement the Hate Crime Statistics Act in the most effective and comprehensive manner possible.

We commend the FBI for the steps it has taken to translate a statutory mandate into an action agenda. From the outset, the FBI has regarded its hate crime collection mandate as an important tool to confront violent bigotry against individuals on the basis of their race, religion, sexual orientation or ethnicity. It never viewed the task as simply another administrative responsibility.

To its credit, the FBI has involved ADL and a number of other leading human relations groups in developing its well-crafted and inclusive training manual and data collection guidelines—publications that demonstrate real sensitivity to the issue.

Working closely with UCR professionals, ADL and a number of leading human relations groups—including the National Gay and Lesbian Task Force, People for the American Way, the Japanese American Citizens League, the American Jewish Committee, and the Organization of Chinese Americans—have served as consultants in the design of the Bureau's training and outreach program.

The level of coordination reflects the involvement of these groups in securing passage of the act. It also points to the important future role we have of helping to implement the act, educate our constituents about it, and work with local law enforcement officials to maximize its benefits to the community.

We look forward in particular to continuing our work with the Bureau and other human relations groups in following up with local law enforcement agencies that have not yet fully implemented this important new data collection initiative.

The Anti-Defamation League believes that the enactment of hate crimes legislation at both the Federal and the State levels has had and will continue to have a measurable impact on bias-motivated violence in our country.

For this reason, we urge Senator Simon's and Representative Schumer's colleagues in the Congress to join them in a united and concerted effort to pass the Hate Crimes Sentencing Act as soon as possible.

Mr. SCHUMER. Thank you, Dr. Riff.

[The prepared statement of Mr. Riff follows:]



New York Regional Office

823 United Nations Plaza New York, N.Y. 10017 - (212) 490-2525

Oversight Hearing
Bias Crime
Crime and Criminal Justice Subcommittee
U.S. House of Representatives
The Hon. Charles Schumer, Chair
Brooklyn, New York
April 20, 1992

CONTACT: Michael A. Riff, N.Y. Regional Office
(212) 490-2525

STATEMENT OF SUPPORT

THE HATE CRIMES SENTENCING ACT OF 1992

Delivered by

Michael A. Riff
Associate Director
New York Regional Office
ANTI-DEFAMATION LEAGUE

My name is Michael Riff. I am here in my capacity as Associate Director of the New York Regional Office of the Anti-Defamation League. For almost 80 years, the Anti-Defamation League has been one of the most respected human relations organizations in the country.

The ADL has opposed discrimination based on race, religion, and national origin since its founding in 1913. As discrimination against other recognized segments of our society has been identified, our policy has evolved to include such additional categories as gender and sexual orientation.

On behalf of the Anti-Defamation League I am, therefore, pleased to have the opportunity to declare our support for the Hate Crimes Sentencing Enhancement Act of 1992 and commend Representative Schumer and Senator Simon for their leadership in introducing this measure. We are grateful to the House Criminal Justice Sub-committee for having the opportunity to present testimony on this all important subject.

Hate or bias crimes--those perpetrated against persons or property on the basis of the victim's race, religion, sexual orientation, ethnicity or national origin--are an increasingly serious problem in our society. They not only have a special emotional and psychological impact on individuals and communities, but carry the potential for tearing apart the fabric of our society through escalating violence and turmoil.

As New Yorkers we are painfully aware of the everyday reality behind these words. We need only recall the recent murders of Yusuf Hawkins, Julio Rivera and Yankal Rosanbaum. All three met their deaths because of bigotry.

In our city and state, hardly a week goes by without our reading in the press or seeing on television yet again the pain and anguish experienced by bias crime victims and their communities. ADL's 1991 *Audit of Anti-Semitic Incidents* revealed that New York State yet again led the nation in harassment of Jews, threats against Jews, and vandalism of Jewish institutions and property.

In addition to its traditional counteraction efforts, which have included tracking and tabulating anti-Semitic incidents, investigating and exposing hate groups, developing community educational programming, and working closely with law enforcement, for the past decade ADL has promoted the passage of legislation to combat hate crimes.

Although prejudice and hatred cannot be legislated or prosecuted out of existence, government must do more to address directly the painful consequences of crimes of bigotry. The Anti-Defamation League believes that the enactment of new hate crimes legislation would not only provide an important additional tool for law enforcement, but would also enhance the deterrent value of the law. Most importantly, a clear signal would be sent to society that acts of bigotry will not be tolerated.

ADL's support for the enhancement of penalties for hate crimes at the federal level is a logical extension of our efforts to enact similar legislation at the state level. For example, here in New York, we continue to urge the State Senate to join the Assembly in passing the "Bias Related Violence or Intimidation Act" (S. 3125B). Prepared by Governor Mario Cuomo and Attorney General Robert Abrams in consultation with the Anti-Defamation League and other human relations organizations in the state, the measure has been stalled in the State Senate for over two years.

In addition to increasing the penalties for crimes that are bias-motivated by creating a new criminal offense called Bias-related violence or intimidation in the first degree (class C felony) and in the second degree (a class D felony), the bill would establish a systematic statewide method of data collection about hate crimes.

The latter reporting section of the bill is meant to dovetail with the Federal Hate Crimes Statistics Act of 1990, passage of which was facilitated by cooperation between ADL and Rep. Schomer, Sen. Simon and several other key legislative leaders. In requiring the U.S. Attorney General to acquire data on crimes which manifest prejudice based on race, religion, sexual orientation or ethnicity, the bill is intended to provide government and law enforcement with an assessment of the scope of the problem of bias crime so that appropriate resources can be allocated to redress it.

While we are encouraged by efforts of the Justice Department, the FBI and our own State Division for Criminal Justice Services as well as many local police forces in gathering and analyzing data under the Hate Crimes Statistics Act (HCSA), we know from experience that compliance will not be as complete as it should be until accompanying state legislation is enacted.

At the same time, we pledge our continuing support for efforts to implement the Hate Crimes Statistics Act in the most effective and comprehensive manner possible. We commend the FBI for the steps it has taken to translate a statutory mandate into an action agenda.

From

For the outset, the FBI has regarded its hate crime data collection mandate as an important tool to confront violent bigotry against individuals on the basis of their race, religion, sexual orientation, or ethnicity. It never viewed the task as simply just another administrative responsibility. The Bureau has shaped its outreach and education efforts on the new Act with substantial input from law enforcement agencies and human relations organizations with prior experience in collecting hate crime data and is responding to hate violence.

To its credit, the FBI utilized existing resources in developing its well-crafted and inclusive training manual and data collection guidelines -- publications that demonstrate real sensitivity to the issue. Working closely with UCR professionals, ADL and a number of leading human relations groups -- including the National Gay and Lesbian Task Force, People for the American Way, the Japanese American Citizens League, the American Jewish Committee, and the Organization of Chinese Americans -- have served as consultants in the design of the Bureau's training and

outreach program.

The level of coordination reflects the involvement of these groups in securing passage of the Act. It also points to the important future role we have in helping to implement the Act, educate our constituents about it, and work with local law enforcement officials to maximize its benefits to the community.

Recognizing that the credibility and usefulness of this data will depend on the quality of the reports, the FBI arranged training seminars for state and local law enforcement authorities.

These

programs have featured presentations on the utility of the data, the nature of prejudice and the impact of hate violence. ADL and other groups have been invited to participate, providing a substantial opportunity to establish and expand relationships with those present. ADL resources, including the League's training video -- produced in cooperation with the New Jersey Department of Law and Public Safety -- have been highlighted at many of these training sessions.

We look forward to continuing our work with the Bureau and other human relations groups during the next, crucial stage of HCSA implementation -- follow up with local law enforcement agencies that have not yet fully implemented this important new data collection initiative. The success of the HCSA will be determined at the local level. It will be measured by the response of police officials to each and every act motivated by prejudice.

The Anti-Defamation League believes that the enactment of hate crimes legislation at both the federal and state levels has had and will continue to have a measurable impact on bias-motivated violence in our country.

For this reason, we urge Senator Simon's and Representative Schumer's colleagues in the Congress to join them in a united and concerted effort to pass the Hate Crimes Sentencing Act as quickly as possible.

Mr. SCHUMER. Ms. OuYang.

STATEMENT OF ELIZABETH R. OUYANG, STAFF ATTORNEY, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND

Ms. OUYANG. I will not read from my prepared written report.

Mr. SCHUMER. Without objection, that will entirely be placed in the record.

Ms. OUYANG. OK. It is important.

I would also like to respond to some of the comments made earlier by oral testimony given by the FBI regarding problems in collecting adequate data as well. Basically, I think it is good that you are here today and we do applaud your leadership in introducing this legislation, especially with the recent L.A. and Rodney King situation and the tensions that the incident has caused across this country.

To understand the increase in violence against Asian-Americans, one must understand the history of scapegoating Asian-American citizens, immigrants, and refugees for the economic and political woes of this country. This history dates back to past and current discriminatory immigration laws against Asian ethnicities, the internment of Japanese-Americans during World War II, and discriminatory employment and housing practices against Asian-Americans.

Underlying the discriminatory treatment Asian-Americans have suffered and continue to face is a refusal to recognize that Asian-Americans born and/or living in the United States are Americans and not foreigners. Incidents of anti-Asian violence have risen as Asian immigrant groups steadily increase in visible numbers.

Asian-Americans are perceived as a threat to the status quo and the cause for the loss of jobs and the downturn in the economy. Asian-Americans are convenient scapegoats in the United States for the economic successes of Asian countries abroad. The persistent failure of the city, State, and Federal governments to equitably distribute resources intensifies resentment between competing groups.

Society's deceptive stereotype of Asian-Americans as the "model minority" further fuels anti-Asian resentment in schools, in business, and at the workplace not only between other minority groups, but society at large.

As the economic recession in this country and the city of New York worsens, the incidents of anti-Asian violence are likely to increase. Of the incidents reported to the New York City's bias incident investigation unit from 1985 to 1989 alone, there was a 267-percent increase in racially motivated attacks against Asian-Americans. Subway crimes against Asian-Americans have increased by over 200 percent since 1987 which is three times the rate of attacks against non-Asians.

Of the many incidents, I would like to highlight a few specific cases to illustrate the severity and range of racially motivated crimes perpetrated against Asian-Americans. I need not go into them. I think they are self-explanatory. They give a range of the different types of incidents across the board, across class, across age, and so forth, of different Asian ethnicities, against different Asian ethnicities.

The Hate Crimes Statistics Act of 1992 is a step toward addressing hate crimes. AALDEF supports increased sentencing for offenses that are hate crimes.

It is important that the law recognizes and distinguishes the gravity of offenses which are motivated by bias-related animus. The law must send a clear message that hate crime offenses are serious offenses and will not be tolerated.

As advocates in the trenches, AALDEF is looking for real and practical solutions to the issues that are costing individuals their lives or loss of their civil rights on a daily basis. In order for the proposed legislation to have a practical and meaningful effect, there must be safeguards to ensure that the law will be properly enforced by the prosecutor's office and the judges.

It is timely that your legislation is being proposed during the 10th year commemoration of Vincent Chin's death, on June 23, 1982, in Detroit, MI. He died 4 days after having been struck on the head several times with a baseball bat. His assailants were two white laid-off automobile workers who mistook Vincent Chin, a Chinese man, for a Japanese man, and killed him blaming him for the decline of the automobile industry in Detroit. The case received national attention when the judge simply placed the assailants on probation and required them to pay only a \$3,000 fine each.

Given the lessons of Vincent Chin's death and the numerous incidents of racial violence since his death, AALDEF offers the following suggestions to ensure effective implementation of H.R. 4797.

AALDEF advocates a permanent special prosecutor trained in recognizing hate crimes and its manifestations to be assigned to cases where hate crime offenses are involved. Mandatory and regularly held trainings for judges and prosecutors are needed to inform them of the types and nature of hate crimes and why they should be classified as hate crimes and the historical and cultural differences and tensions between groups in the localities where hate crimes are committed. These trainings should include participation by victims of hate crimes and community organizations knowledgeable about bias-related violence.

Implementation of the proposed law at all institutional levels is needed to guarantee proper enforcement. Educating the prosecutors and judges about the new law, if enacted, implementing systemic procedures to ensure prosecutors will examine the case for hate crime offenses, and amending sentencing forms to include a check-off box or other system for judges to routinely indicate if it is an offense involving a hate crime are examples of necessary institutional reform.

To monitor the effectiveness of the law, a reporting system available to the public should be created indicating the number of cases in which the victim of the crime felt it was a hate crime, the prosecutor recommended to the judge increased sentencing because the offense involved a hate crime and the judge determined increased sentencing should be imposed.

Lastly, AALDEF would urge the Subcommittee on Crime and Criminal Justice to work closely with other subcommittees dealing with housing, jobs, education, and distribution of Federal resources to devise a comprehensive approach to combating the causes of bias-related violence.

Basically I would like to comment on some of the things that were raised by speakers in the previous panel. As an advocate in the trenches, you have to understand on a daily basis all of the institutional barriers that make it nearly impossible for a minority person, particularly a minority person with a language barrier, to bring these types of crimes forward.

First of all, it is trust. Less than 1 percent of the police force in the New York Police Department are composed of Asian-Americans. And what that does, it starts at a very basic level, from the time a victim calls the police, whether or not they respond, whether or not they understand what they are saying, how they are treated at the police department, whether or not, they are encouraged or intimidated to bring charges, et cetera, et cetera.

In order for this legislation to have a meaningful effect, it requires a commitment of leaders. I think it goes unsaid that success depends on the willingness of people who want to implement this, the true commitment of people to take this on.

Third, the inherent politics involved in these types of situations. The FBI is relying on local police departments and so forth to provide them with statistics and data, which impacts directly to whether or not certain claims are prosecuted. The decision to prosecute certain claims carries political consequences in the city which are also important things that people need to look at.

I would like to call your attention to the Committee Against Anti-Asian Violence, which is a local-based group, who is preparing a 5-year report on incidents of anti-Asian violence across this country as a way to further supplement ongoing statistics out there.

It is very difficult for an Asian-American in the city and elsewhere to bring these claims forward. Oftentimes the police don't recognize the incident as a racially motivated incident. It never gets classified as a racially motivated incident, and they are often intimidated in bringing these charges forward.

And the lack of effective hate crime State legislation is also a major impediment. I will answer any questions you have.

Mr. SCHUMER. Thank you.

[The prepared statement of Ms. OuYang follows:]

PREPARED STATEMENT OF ELIZABETH R. OUYANG, STAFF ATTORNEY, ASIAN AMERICAN
LEGAL DEFENSE AND EDUCATION FUND

INTRODUCTION

My name is Elizabeth R. Ouyang. I am a staff attorney at the Asian American Legal Defense and Education Fund (AALDEF). I testify before you today to cite the growing incidents of racially motivated violence against Asian Americans in New York City and to support the passage of H.R. 4797, the Hate Crimes Statistic Act of 1992.

Founded in 1974, AALDEF is a non-profit civil rights organization that addresses issues affecting Asian Americans through litigation, community education, and advocacy. AALDEF represents victims of racially motivated violence perpetrated by civilians and by the police, produces educational pamphlets, and conducts community trainings on victim's rights.

On a regional level, AALDEF monitors incidents of racially motivated violence against Asian Americans throughout the east coast. On a national level, AALDEF is part of a National Network Against Anti-Asian Violence which monitors cases nationwide and seeks a national strategy to reverse the wave of anti-Asian violence. AALDEF advocated for the passage of the federal Hate Crime Statistics Act which was enacted in 1990.

BACKGROUND

To understand the increase in violence against Asian Americans, one must understand the history of scapegoating Asian American citizens, immigrants, and refugees for the economic and political woes of this country. This history dates back to past and current discriminatory immigration laws against Asian ethnicities, the internment of Japanese Americans during World War

II, and discriminatory employment and housing practices against Asian Americans. Underlying the discriminatory treatment Asian Americans have suffered and continue to face is a refusal to recognize that Asian Americans born and/or living in the United States are Americans, and not foreigners. Incidents of anti-Asian violence have risen as Asian immigrant groups steadily increase in visible numbers.

Asian Americans are perceived as a threat to the status quo and the cause for the loss of jobs and the downturn in the economy. Asian Americans are convenient scapegoats in the United States for the economic successes of Asian countries abroad. The persistent failure of the city, state, and federal governments to equitably distribute resources intensifies resentment between competing groups.

Society's deceptive stereotype of Asian Americans as the "model minority" further fuels anti-Asian resentment in schools, in businesses, and at the workplace not only between other minority groups, but society at large.

As the economic recession in this country and the city of New York worsens, the incidents of anti-Asian violence are likely to increase. Of the incidents reported to the New York City's Bias Incident Investigation Unit from 1985-1989 alone, there was a 267% increase in racially motivated attacks against Asian Americans. Subway crimes against Asian Americans have increased by over 200% since 1987 which is three times the rate of attacks against non-Asians. Of the many incidents, I would like to highlight a few

specific cases to illustrate the severity and range of racially motivated crimes perpetrated against Asian Americans.

On January 2, 1987, New York City police officers broke into the Chinatown apartment of the Wong family without a warrant to investigate a complaint that the Wong family was stealing cable services. The police attacked members of the family, including Mrs. Wong who was seven weeks pregnant at the time and made racially derogatory comments to them. The police brought charges of resisting arrest, assaulting an officer, and obstructing justice against the Wong family which charges were all later dismissed. On behalf of the Wong family, AALDEF brought a federal civil rights action against the police department and obtained a \$90,000.00 settlement in July of 1989.

On December 26, 1989, forty youth alleged to be members of the gang, the Master Race, uttered racial epithets and attacked five young Asian Americans with broken glass bottles. One of the Asian American victims received eighty five stitches. The incident occurred outside an arcade at a shopping mall in Queens, New York.

On March 15, 1990, Henry Lau, a thirty-one year old Chinese immigrant was fatally stabbed four times on a subway train in New York City. Prior to stabbing him, the assailant taunted Mr. Lau repeatedly calling him an "Eggroll". Approximately forty passengers were in the subway car when the stabbing occurred.

On May 13, 1990, three Vietnamese men were attacked in Flatbush, Brooklyn, one of whom was assaulted with a clawhammer. Mistaking the Vietnamese for Koreans, the assailant shouted, "Koreans, what are you doing here?" and "Get out of America."

This incident took place just blocks away from the Korean Family Red Apple store, the focus of a year-long boycott that has come to symbolize racial tensions in New York City.

On August 3, 1990, Damon Lew, who works for the U.S. Army, was attacked in Bensonhurst, New York by two white men whose car was momentarily blocked while Mr. Lew backed his car into his driveway. The assailants started calling him "chink" and "gook" and got out of their car armed with a baseball bat and a tire iron. They hit Mr. Lew in the head and smashed Mr. Lew's car with the baseball bat and iron and returned later to cause further damage to Mr. Lew's car. The assailants left and returned for a second time with two Molotov cocktails. Neighbors intervened and stopped the assailants from lighting them.

On December 10, 1991, ten masked and unmasked individuals entered Lee's Fancy Fruit Market in Bedford-Stuyvesant, Brooklyn. They ransacked the store and beat Mr. and Mrs. Kim, the storeowners, with baton-like sticks, causing Mrs. Kim to receive scratches to her head. No arrests have been made by the police. On February 18, 1992, the store was burnt down. The Fire and the Police Department have yet to determine if the assault on December 10, 1991 is connected to the February 18, 1992 fire.

On February 17, 1992, approximately twenty youths in broad daylight chased a fourteen year old Korean boy in Bronx, New York, several of whom assaulted him with their fists and teeth, uttered racial epithets at him, and struck his back with a bat. The young boy sustained injuries to his eye, scalp, face, hands and back and required hospitalization for four days.

On April 8, 1992, Dr. Babu Patel, an Asian Indian doctor in Jersey City Heights was struck in the head and sprayed with mace in his eyes by youths who yelled, "Hindu, go home." To date, it is unknown whether the assailants are member an organized gang called the Dot Busters whose avowed purpose is to rid New Jersey of Asian Indians.

The U.S. Commission on Civil Reports recently released its report in February of 1992 regarding civil rights issues facing Asian Americans in the 1990's. The Report documents the growing number of racially motivated incidents against Asian Americans.

H.R. 4797, HATE CRIMES STATISTICS ACT OF 1992

Given the escalating incidents of racially motivated crimes, the government must address the causes of racially motivated violence and enact comprehensive legislation that provides criminal and civil remedies to effectively deter and punish further acts of racially motivated violence and to enable victims to seek effective redress.

H.R. 4797, Hate Crimes Statistics Act of 1992 is a step in that direction. AALDEF supports increased sentencing for offenses that are hate crimes. It is important that the law recognizes and distinguishes the gravity of offenses which are motivated by bias related animus. The law must send a clear message that hate crime offenses are serious offenses and will not be tolerated.

As "advocates in the trenches", AALDEF is looking for real and practical solutions to the issues that are costing individuals their lives or loss of their civil rights on a daily basis. In order for the proposed legislation to have a practical and

meaningful effect, there must be safeguards to ensure that the law will be properly enforced by the prosecutor's office and the judges.

It is timely that your legislation is being proposed during the tenth year commemoration of Vincent Chin's death. On June 23, 1982 in Detroit, Michigan, Vincent Chin died four days after being struck on the head several times with a baseball bat. His assailants were two white laid-off automobile workers who mistook Vincent Chin, a Chinese man for a Japanese man and killed him blaming him for the decline of the automobile industry in Detroit. The case received national attention when the judge simply placed the assailants on probation and required them to pay only a \$3,000.00 fine each.

Given the lessons of Vincent Chin's death and the numerous incidents of racial violence since his death, AALDEF offers the following suggestions to ensure effective implementation of H.R. 4797.

AALDEF advocates for a permanent special prosecutor trained in recognizing hate crimes and its manifestations to be assigned to cases where hate crime offenses are involved. Mandatory and regularly held trainings for judges and prosecutors are needed to inform them of the types and nature of hate crimes and why they should be classified as hate crimes and the historical and cultural differences and tensions between groups in the localities where hate crimes are committed. These trainings should include participation by victims of hate crimes and community organizations knowledgeable about bias related violence.

Implementation of the proposed law at all institutional levels is needed to guarantee proper enforcement. Educating the prosecutors and judges about the new law, if enacted, implementing systemic procedures to ensure prosecutors will examine the case for hate crime offense, and amending sentencing forms to include a check off box or other system for judges to routinely indicate if it is an offense involving a hate crime are examples of necessary institutional reform.

To monitor the effectiveness of the law, a reporting system available to the public should be created indicating the number of cases in which the victim of the crime felt it was a hate crime, the prosecutor recommended to the judge increased sentencing because the offense involved a hate crime and the judge determined increased sentencing should be imposed.

Lastly, AALDEF would urge the Subcommittee on Crime and Criminal Justice to work closely with other subcommittees dealing with housing, jobs, education, and distribution of federal resources to devise a comprehensive approach to combatting the causes of bias related violence.

New York Observer August 9, 1989

Chinese Family's Suit Alleging Police Brutality Ends in \$90,000 Settlement

By Helen Thorpe

After two years, a highly publicized lawsuit alleging police brutality in Chinatown has been closed with a \$90,000 out-of-court settlement.

Under the settlement, which was concluded last month, Hung and Feek Yin Wong and Mrs. Wong's sisters, Kim and Holly Woo, are receiving \$80,000 from the city and \$10,000 from Manhattan Cable Television.

The settlement stems from a January 1987 incident that appeared on the front page of Chinatown newspapers for months

and galvanized the Asian-American community to demonstrate in support of the four plaintiffs.

Two white police officers from the Fifth Precinct went to the Wong family's apartment to investigate allegations made by a cable television employee who had accused the Wongs of using cable television without paying for the service and had argued with the family. The man says he was threatened with a knife. The Wong family says that there was no knife and that the service worker cut wires that ran over their apartment door, leaving the wires dangling dangerously.

In a complaint report, Mr. and Mrs. Wong and the Woo sisters allege the investigating officers forcibly entered their apartment without a search warrant and beat them in arresting them. The plaintiffs argue that they were falsely accused of criminal behavior by the cable company employee, and they accuse both him and the officers of racial bias. The plaintiffs quote an arresting officer as saying, "Why don't you Chinese go back to China?"

The four Chinese immigrants, who are naturalized citizens, were detained for more than 24 hours following their arrest. Mrs. Wong, who was seven months pregnant at the time, says she was hit in the head with a pair of handcuffs by one of the officers and sustained a cut that required 12 stitches. Mrs. Wong alleges that an of-

ficer prevented her from having medical staff at the emergency room of Beekman Downtown Hospital check the condition of her unborn child, because the officer said she should be treated only for facial injuries. Only Mrs. Wong was given any medical attention, although all of the victims say they requested such care.

Following the incident, criminal charges of resisting arrest were brought against the Wongs and the Woots by the office of Manhattan District Attorney Robert Morgenthau. The four were represented by the Asian American Legal Defense & Education Fund, while other civil-rights groups, such as the Committee Against Anti-Asian Violence, staged demonstrations against the Police Department and collected signatures or petitions protesting the family's treatment. The charges against the four Chinese-Americans were dropped due to insufficient evidence on April 1, 1987.

At the same time, the District Attorney's investigation into the allegations by the Wongs and the Woots of police brutality were dismissed for lack of evidence. The behavior of Police Officers Patricia Sweeney and Steven Rinchey was brought to the attention of the Police Department's Civilian Complaint Review Board, but a police spokesman told The Observer that an internal investigation led to the determination not to bring departmental charges against the officers.

Mr. and Mrs. Wong and the Woo sisters filed a civil-rights action in U.S. District Court in Manhattan on May 14, 1987, but the lawsuit did not come to trial and the out-of-court settlement closed the case on July 18.

Thomas Roberts, a lawyer in the office of the city's Corporation Counsel, which was defending the city in the lawsuit, said: "The case was settled to everyone's satisfaction." Manhattan Cable Television spokeswoman Anita Aboulafia said: "The person who is familiar with the case is out of the office."

The plaintiffs declined to be interviewed for this article, but before the settlement, Mrs. Wong was quoted in the New York *Nieihbei*, a Japanese-American weekly newspaper, as saying: "We are not just doing this for ourselves. We're doing this for everyone's rights. This is not the first time that this has happened, and even though this has been happening in the past, not many people are willing to speak up. It is the future something like this happens to them. I hope they will not be afraid to come up and speak up for their rights."

Asian-American civil-rights activists agree that the Wong-Woo case is part of a pattern of harassment, discrimination and violence that has been on the rise recent years, according to Monona Yin of the Committee Against Anti-Asian Violence. Victims are reluctant to report their inju-

ries, advocates say, due in part to cultural differences between themselves and those who would hear their complaints.

The rate of occurrence of police brutality is difficult to document because such allegations are grouped with other actions initiated against members of the Police Department, such as actions for false arrest, and because most suits alleging police brutality end in out-of-court settlements, without a determination of guilt.

Last year, a total of 687 "police actions" were brought against the N.Y.P.D. in state and Federal courts, according to the New York City Legal Department. Eugene Borenstein, first deputy chief of the department's Tort Division, said: "When you look at them, there's a lot of them with an assault thrown in." According to Mr. Borenstein, in the same calendar year, 390 police action cases reached some form of settlement. Of those, 289 were reached out-of-court, and the city paid approximately \$9 million to plaintiffs, he said.

In 1989, about \$6 million has been paid to plaintiffs of such lawsuits in 144 out-of-court settlements, according to the Law Department. Of the remaining 283 cases that have been closed this year, 11 came to trial and were decided in favor of the defendant—the city and the Police Department—while 6 were decided in favor of the plaintiffs and 122 were dismissed, were settled by an insurance company or for some other reason are no longer being pursued, Mr. Borenstein said.

Daily News January 5, 1990

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Friday, January 5, 1990

ML MJ 1

Gang-fear grips Queens Asians

Attacked teens won't talk to cops

By JAMES DAO

Daily News Staff Writer

A shadowy northeastern Queens gang called The Master Race is believed responsible for a mob assault on five Asian-American teenagers in Bayside. But the investigation has stalled because the victims are afraid to identify their attackers, police and community leaders say.

Fearing that the incident might have been racially motivated, Asian community leaders yesterday were pressing the youths to meet with police to look at photographs of suspects.

"The boys are scared (of retaliation)," said Jeffrey Kung of the Organization of Chinese Americans. "But we have to stop this sort of random attack. If we don't deter these people, they will continue."

Broken beer bottle

Police say the attack occurred at 10:30 p.m. on Dec. 26 as two Korean brothers and three Chinese, all from Queens, left a video arcade in the Bay Terrace Shopping Center on Bell Blvd.

One of the Koreans, a 19-year-old student from White-stone, was slashed across the back with a broken beer bottle.

The youth, enrolled at the Massachusetts Institute of Technology, required 85 stitches and was hospitalized for two days at Booth Memorial Medical Center.

His brother, a 15-year-old Stuyvesant High School stu-

**'The boys are
scared (of
retaliation).'**

— Jeffrey Kung

dent, was slashed as he came to his brother's aid. A third boy, a 16-year-old from Elmhurst, received 17 stitches for cuts to his face and back.

The youths did not file a report of the attack, which involved 30 to 40 gang members, until Jan. 1, and have not cooperated with police.

But cops said they believe

The Master Race, or TMR, is behind the attack because the group hangs out at the mall and has been involved in several other incidents. The loosely knit group has also been linked to harassment of students at Benjamin Cardozo High School.

Although TMR's members are primarily whites in their late teens and early 20s, police say the gang may also have Hispanic members.

Was it racial?

Investigators have not labeled the attack a bias incident because no racial slurs were used, said Community Affairs Officer Jeffrey Holler of the 109th Precinct.

William Chong, of the state Division of Human Rights, said he is treating this as a potential bias incident because one victim was reportedly called "Bruce Lee."

Also investigating is the city's Human Rights Commission, which will meet with police and community leaders in Flushing on Monday.

New York Newsday, March 17, 1990 pages 3,11

B'klyn Subway Rider Killed For Looking at Passenger

By Allison Carper
and Mitch Gelman

Henry Lau was killed, police said, because he looked at a man the wrong way on a Brooklyn subway train.

The 31-year-old shoe salesman was riding home from work on a crowded southbound N train about 9 p.m. Thursday when a man sitting across from him yelled, "Hey, what are you looking at?" witnesses told police.

Lau, who also was sitting, repeatedly told the man to leave him alone, but the man continued bothering him, detectives said.

"The murderer came over to Lau and Lau told him to go away," transit police spokesman Al O'Leary said. "The murderer went back to his seat, but kept yelling at Lau, and eventually came back and attacked Lau with a knife."

"You often hear about New Yorkers trying to avoid eye contact," one transit police official said. "That is why."

A police officer who responded said there were about 40 passengers in the car and that Lau did "everything he could" to avoid a confrontation. But when the confrontation became unavoidable and the men fought, none of the riders came to his aid, the officer said.

"They left him hanging," the officer said. "The guy came back and stabbed him four times, once in the heart."

Then, witnesses said, the attacker walked calmly off the train at the Eighth Avenue station in the Bay Ridge section of Brooklyn. The attacker — described as muscular, about 5-foot-7 and in his late 40s — was neatly dressed, wearing a waist-length tan jacket, brown pants, a black beret and black shoes.

"He never even looked back," one witness told the officer.

The knife was not recovered, police said.

Lau, who lived on 62nd Street in Bensonhurst, was stabbed three stops before his station. He was taken to Maimonides Medical Center, where he was

— Please see SLAYING on Page 11

Subway Rider Slain Over Glance

SLAYING from Page 3

pronounced dead at 10:30 p.m.

The victim, who moved to New York from Hong Kong a year ago, worked in a shoe store at Sixth Avenue and 14th Street in Manhattan, police said. Lau, whose first language was the Cantonese dialect of Chinese, spent his nights studying English at Queens College.

Lau was the seventh person killed on the subways this year, according to transit police. Five of the six previous slayings have been solved. Detectives asked anyone who witnessed the killing

to call (212) 643-9179. All calls will be kept confidential, they said.

Detectives from the transit police major case squad and the 55th Precinct printed fliers last night seeking information about Lau's killing. The fliers, in English, Spanish and Chinese, will be distributed in the area.

Lau's brother, Tom, who lived with him and identified his body at the Kings County morgue yesterday, told police that his brother had come here for a better life.

"It's sad every time someone is killed, but this one is particularly sad," O'Leary said. "This is the American dream going up in smoke."

New York Newsday, New York, NY

August 16, 1990 page 3, 41

Decoy Cops Protecting Asian Riders

By Katherine Foran

Crime figures showing that Asian riders have become prime targets for subway robbers have prompted transit police to set up a special decoy detail to stem the attacks.

The undercover unit, made up of a Korean officer and Japanese officer, started patrolling last Saturday in Manhattan after Transit Police Chief William Brotton responded to the alarming statistics and calls for help from Asian-American groups concerned about mounting victimization.

The pilot project, established in consultation with the Manhattan District Attorney's Office and the Family Court Division of the Corporation Counsel, which prosecutes juvenile cases, could be expanded to other boroughs or eliminated, depending upon its success, said Lt. Jack Mopie, commanding officer of the transit police central robbery unit.

Robberies against Asian subway riders have grown at three times the rate of attacks against non-Asians. Since 1987, reported subway robberies against non-Asians have increased 63 percent, while reported subway robberies against Asians have soared 204 percent, Mopie said.

Of 8,269 robberies on the subways last year, 905 involved Asian victims. As of July 21, 512 of the 5,032

robberies so far this year were against Asians, Mopie said.

Representatives from several Asian groups yesterday cautiously praised the initiative.

"The decoys are a good beginning. At least they are recognizing the problem. Some of us felt they were dancing around it before," Dr. Mini Liu, co-chair of the Committee Against Anti-Asian Violence, said.

Liu and representatives of about six Asian community groups met with transit police brass in March to discuss their concerns.

"We asked specifically for a decoy unit at that time. But the chief [Vincent Del Castillo, who has since retired] said crime was up everywhere, that they didn't have the statistics to show there was a problem specific to Asians," Liu said.

Stereotypes suggesting Asians are reluctant to report crimes or fight back may make them more frequent victims, Liu said.

Paul Mak, executive board chairman of the Brooklyn Chinese-American Association, said Asians also may be tar-

geted because those who work in Chinatown and in the Garment District typically are paid in cash.

"Sometimes there is a language barrier that makes it difficult for people to report crimes, and many new immigrants do not understand the criminal justice system," Mak said.

Transit police yesterday said they have been working with the Asian communities since last year to increase crime reporting and offer practical safe-

ty tips to the many new immigrants. The decoy project is the latest effort to curtail attacks.

Since Saturday, decoys have made two arrests.

The first, on Saturday, was a 15-year-old chain snatcher. Then, at 7:30 p.m. Tuesday, police arrested Michael Cooper, 26, of 41-07 10th Street, Long Island City, Queens, at the Canal Street station on the N and the R lines as he allegedly tried to snatch a decoy's

chain. Cooper, on probation, has 30 prior convictions for larceny and robbery — 25 of them on the subway, officials said.

"He's the kind of career criminal we're hoping this program will catch," said Dean Esserman, counsel to Brotton. "That's how we're going to measure the success of this program: Not by the number of arrests we make, but whether we start seeing the crime rate go down."

Two arrested in Brooklyn bias attack

Two men were arrested last night in a bias attack on an Asian man in front of his Brooklyn home.

The victim, whose name was withheld, was assaulted Monday night in Bensonhurst by two white men with a bat and a crowbar.

The attackers were apparently upset that their car was stuck in traffic while the Asian man was parking, said Lonnie Soury of the state Human Rights Commission.

They struck the victim in the head as they shouted racial epithets, authorities said.

An Oriental neighbor intervened, hitting one attacker with a stick, and the pair fled.

A few minutes later, they returned, threatening to kill the man they had assaulted, but were chased off again.

They came back with a Molotov cocktail to burn down his house, witnesses told police, but fled when neighbors screamed.

Julius Van Alst, and Edward Witney, both 34, face charges including assault, attempted arson and violation of state civil-rights laws.

The man was not seriously hurt. David Scifman and Gene Ruffin

Gang Trashes Korean Store

By Manuel Pérez-Rivas
and Curtis Rist

STAFF WRITERS

A group of as many as 10 men wearing masks ransacked a Korean fruit store in Brooklyn yesterday morning in an attack that police described as a bias crime.

A store worker, who did not want to be identified, confirmed a police report that a group of between seven and 10 men entered Lee's Extra Family Fruit store at 479 Nostrand Ave. in Bedford-Stuyvesant at about 8:30

a.m.

Without saying a word, they proceeded to knock over bins of fruits and vegetables.

"The fruit was all over the place," the worker said.

Police spokesman Det. Joseph Gallagher said the couple who own the store were slightly injured in the attack.

The man, identified by one of the store's clerks as Tong Kwang Kim, refused medical treatment. His wife, Ok Sun Kim, received eight stitches to close a head wound at Kings Coun-

ty Hospital.

"They came in and broke some groceries, some fruit, and some lights," said the clerk, Woomi Jo.

Police said their investigation into the attack is continuing and has been allowed because of a language barrier with the Korean-speaking owners. Detectives are planning to interview the store owners again today with an interpreter present, said police spokesman Sgt. Ed Burns.

Police gave no hint of a motive in the attack, and workers and neighboring shop owners said they were

not aware of any troubles that the store owners have been having in the past months.

The store remained opened following the attack, and business seemed normal all day.

Awareness of racially-connected attacks involving Korean fruit store owners in the city has grown following a much-publicized boycott by some black shoppers of the Family Red Apple Market in Flatbush throughout 1990 after an alleged altercation with a black customer. The store owner sold that store in May.

THE JERSEY JOURNAL

125th Year — No. 296 □ □ □

Saturday, April 11, 1992

35¢

Home Delivery — \$1.45 weekly

Bigotry blamed in attack on Indian

Doctor struck outside home in Heights; 2 arrested

By Stan H. Evans
Journal Staff Writer

Bias was the motivation in an attack on an Asian Indian doctor and his family in Jersey City Heights, police said, and community leaders have called for an investigation into what they say is a surge in racially-motivated crime.

—Dr. Babu Patel was struck in the

head and sprayed with mace outside a relative's Griffith Street home Wednesday night by youths who yelled "Hindu, Go Home," authorities said.

Soon after the 10 p.m. attack, police arrested two Heights youths — a 17-year-old Cambridge Avenue resident and Adam Padlock, 18, of Terrace

Avenue. They were charged with aggravated assault. Other charges may follow, authorities said.

Hendy Sabh, president of the 19 organizations that make up the Federation of Indian Associations of New Jersey, has sent a letter to Acting Mayor Marilyn Roman and Gov. Jim Florio

about the attack.

Singh said he hopes he can spur authorities to take action to avoid a spate of attacks on Asian Indians similar to a series of assaults in Hudson County during 1987. In that rash of crimes, a hate group that dubbed itself the "Dot Busters" targeted Indians. The dot re-

ferred to the 'tikka' which some Asian-Indian women wear on their foreheads. Two men were convicted in a highly-publicized trial that put Jersey City in the national spotlight for bias crimes.

"I want to let the mayor and governor know that these racial attacks have started again," Singh said.

Mr. SCHUMER. Mr. Katz.

STATEMENT OF HOWARD KATZ, BIAS BILL COORDINATOR, NEW YORK CITY GAY AND LESBIAN ANTI-VIOLENCE PROJECT

Mr. KATZ. Thank you for holding these hearings and inviting me to participate.

I am Howard Katz of the New York City Gay and Lesbian Anti-Violence Project. Founded in 1980, the Anti-Violence Project is a full service assistance agency serving the lesbian and gay community. The project provides free confidential counseling, advocacy support to women and men who have experienced antigay and antilesbian attacks, sexual assault, HIV-related violence, domestic violence, and other forms of victimization.

By documenting violence motivated by hate, and through community outreach and education, the project also works to reduce public tolerance of antigay and antilesbian violence and to increase the sensitivity of social service, legal, and criminal agencies to the needs of the lesbian and gay crime victims. The project operates a 24-hour hot line and is a member of the Hate Crimes Bill Coalition.

First of all, I am sorry to report that hate-motivated crimes against gay men and lesbians got worse in 1991. In fact, in just 2 years, reports of hate crimes to the project have nearly doubled. If interest is fully good news, it is that the rate of increase went down this past year.

The first chart shows the huge increase from 1989 to 1990, a 65-percent increase, and the 16-percent increase from 1990 to the 1991. Given the jump in 1990, we never thought that 1991 could be worse. Well, in fact, it was.

Bias crimes against lesbians and gay men continue to rise throughout New York. In fact, in 1991, half of our reported cases occurred outside Manhattan. One in every three bias incidents, however, occurred in Chelsea and the East and West Villages. This map shows where the incidents occurred in this area, from Houston to 25th Street, from the Hudson River to Avenue B. Each of those dots represents an incident reported to us.

This proves once again that the pattern of antilesbian and antigay crime is different from other forms of hate crime. For us, perpetrators come into neighborhoods perceived to be lesbian or gay to seek out victims. It is not a question of crossing into someone else's turf. Rather, in many instances, gay bashers go out hunting for sport, to beat up some faggots, to get the queers.

Our statistics show that gay bashers are in fact true cowards. To prove what men they are, they attack in gangs and they outnumber their victims, or they make sneak attacks or scream from the safety of passing cars, or they resort to anonymous calls or threatening mail.

Unfortunately, fewer persons than ever before are reporting their victimization to the police. As you can see by this next chart, the percentage of persons reporting to the police is steadily declining, and in 1991, barely 40 percent of the victims filed a report with the police, the lowest number in our history.

We believe this problem is because most people recognize that even if a hate crime perpetrator is caught, the chances of any meaningful punishment are extremely small. This is exactly why

we need strong hate crimes legislation, both here in New York State and at the Federal level.

We applaud the enactment in 1990 of the Federal Hate Crimes Statistics Act with the inclusion of sexual orientation. We do question why gender and disability were omitted. But a reporting bill is not enough to deal with this problem. And we believe that the data collection methods being currently employed are flawed and would seriously undercount the extent of the problem.

First of all, police departments are not mandated to report hate crimes, they are only encouraged to do so. There are many jurisdictions around the State and country who are not reporting, or not reporting crimes against lesbians and gay men.

Second, there were not enough resources allocated to improve the reporting. Most police departments and district attorney offices around the country were never given serious sensitivity training to deal with survivors of gay bashing, and even here in New York City, where we have a bias unit of the NYPD in existence for many years, the numbers reported to them consistently run one-fifth to one-seventh of the figures reported to us.

Many gay men and lesbians are afraid or unwilling to go to the police. In a study conducted last year by the New York City Human Rights Commission, 73 percent of the incidents reported to them were never reported to the police. In 32 percent of those incidents, the victims indicated mistrust or fear of harassment of the police as their reason for not reporting the incident.

Third, most gay men and lesbians have no civil rights protection. So if they report the incident to the police and it becomes public information, they could be fired from their jobs, denied places to live, and ostracized from the communities in which they live just because of their sexual orientation.

Finally, where there are agencies such as our own where the members of our community feel more secure in reporting, there is no provision for the FBI and Justice Department to use our statistics. We can provide information and still maintain the confidentiality of our clients, and many communities, not just the lesbian and gay community, have respected data collection agencies that monitor hate crimes. My distinguished colleague Dr. Riff of the Anti-Defamation League represents one of these agencies. The Committee Against Anti-Asian Violence and the Southern Poverty Law Center come to mind immediately.

We are dedicated to sensitizing and educating our fellow citizens to help reduce the epidemic of hate crimes that are sweeping our communities and our country. We remain steadfast in our resolve to work with legislators like yourselves to effectively deal with this problem. We are committed to continue our efforts to sensitize members of the law enforcement and judicial systems. And first and foremost, we will continue to represent the gay and lesbian community to ensure that victims of hate crimes have somewhere to turn to, someone who will provide help when needed and advocate on their behalf. We will fulfill our mandate.

We encourage our legislators to understand the breadth of this problem and to enact meaningful legislation that deals with this issue, such as H.R. 4797.

Thank you once again for the opportunity to have our voices heard. I will gladly answer any questions.

Mr. SCHUMER. Thank you, Mr. Katz.

[Charts referred to above follow:]

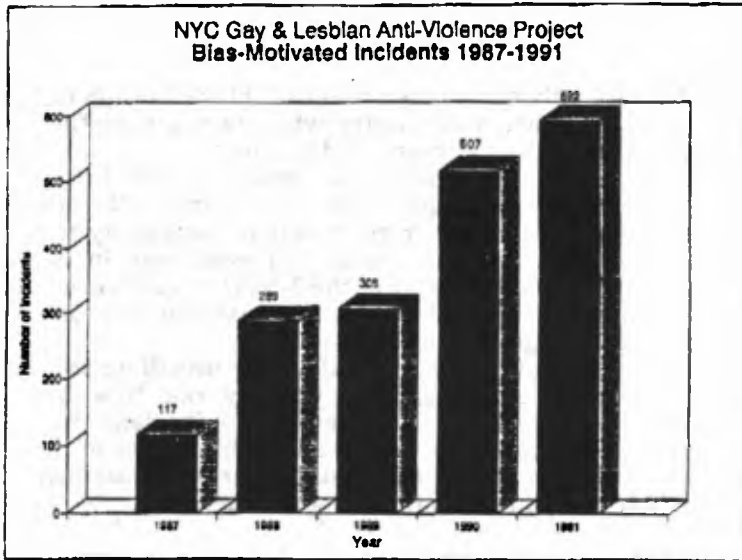


CHART A



Chart B

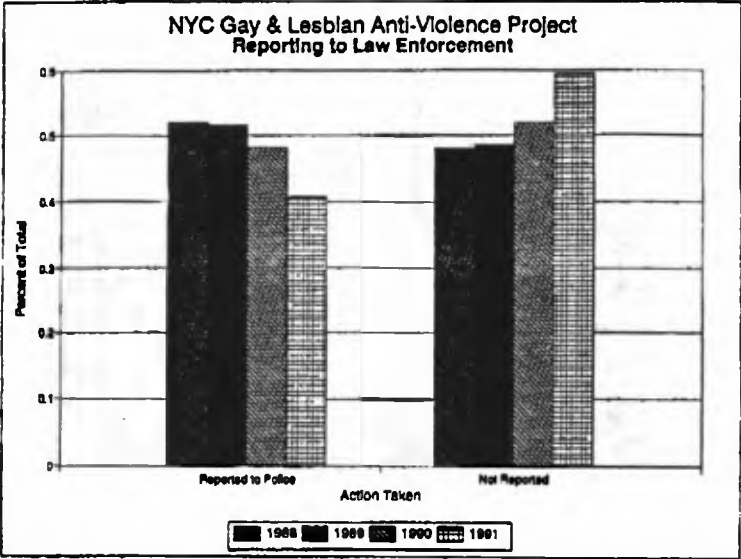


CHART C

Mr. SCHUMER. Ms. Miccio.

STATEMENT OF KRISTIAN MICCIO, ESQ., DIRECTOR AND ATTORNEY IN CHARGE, SANCTUARY FOR WOMEN, INC., CENTER FOR BATTERED WOMEN'S LEGAL SERVICES

Ms. MICCIO. Thank you. I would like to extend my appreciation to you for holding these hearings. I would like to begin by saying that we at the Center for Battered Women's Legal Services support the intent of H.R. 4797.

I am testifying today from the perspective of an attorney who sees battered and raped women on a daily basis. In a year's period of time, we received 500 cases at our center. We answered over 2,000 calls for help. We set up centers throughout New York City, throughout New York State, and we also are working on a national program to establish centers like our own throughout the country.

I am testifying today from the perspective of an attorney who specializes in representing women who are victims of gender-motivated violence, but my testimony is also drawn from my experience as an prosecutor in the Bronx D.A.'s office. And finally, my testimony is shaped by my experience as a woman.

Let me begin by stating that any legislation aimed at deterring or tracking bias-motivated crimes must include gender as a protected class. To specifically exclude gender, as the Federal Hate Crimes Reporting Act does, ignores those crimes perpetrated against women because we are female and it sends the message that such acts are not worthy of our collective censure.

Hate crimes against women are manifested through acts of sexual and physical violence. FBI statistics reveal that gender-motivated violence against women, specifically rape and domestic violence, is spiraling upward, thereby outstripping other forms of crime.

In the past 10 years rape of women by men rose four times as fast as the national crime rate.

Acts of violence based on gender, like acts of violence based on race, ethnicity, religion and sexual orientation, are not random, isolated crimes against persons who happen to be female. Rather, these are crimes against individuals that are meant to intimidate and terrorize a larger group of people. This places rape and other forms of violence in the context of bias-motivated hate crime.

When a women is raped or beaten, it sends the same message to all women that a hate crime against a black person sends to all black people. That message is one of domination and control. Rape, as an example of a hate crime against women, is the most powerful tool of domination as it functions and operates as a means of social control. Rape keeps women in a secondary status by closing doors, limiting options and opportunities, and denying autonomy and freedom.

Violence and the internalized and constant threat of violence pervades every aspect of women's lives. The fear of rape controls what we wear, where we live, where we work, and how we behave.

Rape and the fear of rape places limits on our liberty and our mobility. Indeed, when a woman is attacked for being in a place where men are safe, it is just as much a bias-related crime as the

recent racially motivated murders in Bensonhurst and Howard Beach.

Any legislation aimed at hate crimes that fails to include gender sends the not-so-subtle message to women that crimes of hate perpetrated against us are inconsequential, that these acts are not real hate crimes.

Crimes of hate against women are at once invisible and all pervasive in our culture. If you are born female, this paradox is difficult to live with.

Yet, whenever we as a society attempt to grapple with crimes of hate, we never recognize women as a discrete class of victims. To wit, the Federal Hate Crimes Reporting Act which specifically excludes gender as a class, so we can't even have a discourse with regard to what constitutes crimes of hatred against women.

Crimes against women, however, unlike the current mythology, occur at epidemic proportions and they are motivated by hatred. The Surgeon General has stated violence against women is the chief cause of death and injury to women.

Hate against women is as old as time itself, and the patterns of hatred are socially ingrained. Notwithstanding this obvious fact, such crimes remain unspoken in our collective discourse. Today, in 1992, to keep such acts in the closet diminishes us all.

Therefore, if the Congress wishes to attack all crimes of hate, women must be included. Anything less would create the illusion of protection, and render hate crimes against women invisible once again.

I have abbreviated my testimony in the interest of time. I am more than willing to answer any questions that you might care to pose.

Mr. SCHUMER. Thank you, Ms. Miccio.

[The prepared statement of Ms. Miccio follows:]

PREPARED STATEMENT OF KRISTIAN MICCIO, ESQ., DIRECTOR AND ATTORNEY IN CHARGE,
SANCTUARY FOR WOMEN, INC., CENTER FOR BATTERED WOMEN'S LEGAL SERVICES

Good morning. I am Kristian Miccio, the founding director of the Sanctuary's Center For Battered Women's Legal Services and chair of the board of the New York City Coalition of Battered Women's Advocates. I am testifying today from the perspective of an attorney who specializes in representing women who are victims of gender motivated violence in the home and on the street. Additionally, my testimony draws upon my experiences as a prosecutor in the Bronx D.A.'s office and from the scholarly research conducted as a professor of family, of criminal and of constitutional law. Finally, the testimony I am about to give is further shaped by my experiences as a woman.

First, let me preface my remarks by congratulating you on your wisdom and your courage in proposing legislation that seeks to protect women and men who are victims of violent crime motivated by hatred. One can only hope that your edifying example will be followed by your colleagues in the Congress by the passage of a meaningful hate-crimes bill--one that affords protection to lesbians and gay men and that extends full protection to women.

Hate crimes against women are manifested through acts of sexual and physical violence. Indeed, FBI statistics reveal that gender motivated violence against women, specifically rape and "domestic" violence, is spiralling upward thereby outstripping other forms of crime¹. In the past ten years rape of women by men

¹Bureau of Justice Statistics, "Criminal Victimization in the United States," Table 5 (1974) Id. Table 5 (1988).

rose four times as fast as the national crime rate². Moreover, 3 to 4 million women were physically assaulted by their husbands³. FBI and Bureau of Justice statistice tell us, quite succinctly, that a woman is raped every six minutee and every 15 seconds a women ie beaten⁴.

According to experts such as Dr. Mary Koss from the American Psychological Association, hate crimes against women are neither random nor arbitrary⁵. They are most often perpetrated by men who know or live with their victims. Indeed, the situs for such violence is often the home, the school, the dormroom or the office and it is perpetrated by one whom the victim knows and trusts.

Hate crimes against women because we are women is palpably different from bias motivated violence against other classes of individuals. To rape or beat a woman requires little logistical effort--one need not stalk a particular bar or terrorize a particular part of the city to perpetrate this form of violence. Legislation then which purports to protect victims of hate motivated violence must include gender and accomodate this

²See footnote above.

³National Coalition Against Domestic Violence as quoted in The Violence Against Women Act. Report from the Committee on the Judiciary, U.S. Senate.

⁴FBI Uniform Crime Reports "Crime in the United States" #7 (1988).

⁵Indeed, according to Bureau of Justice Reports, 46% of all rapes are "acquaintance" rapes and this statistic is viewed as quite conservative since this statistic deals with reported rapes footnote continued and some jurisdictions still have a marital rape exemption. e.g. Maryland.

difference.

Rape and the threat of violence based on gender robs women of our freedom and violates our civil rights. It results from the structural relationships of power, of domination and of privilege between men and women in society.⁶ It is a political act since it carries with it the same potential for tearing apart the fabric of our society as hate crimes based on race, ethnicity, religion, or sexual orientation.

Furthermore, acts of violence based on gender - like acts of violence based on race, ethnicity, religion and sexual orientation - are not random, isolated crimes against persons who happen to be female. Rather, these are crimes against individuals that are meant to intimidate and terrorize the larger group or class of people - women.⁷ This places rape in the context of bias-motivated hate crimes; we are raped because we are female.

When a man rapes a woman, he sends the same message to all women that a hate crime against a black person sends to all black people. That message is domination and control. Rape is the most powerful tool of domination as it functions and operates as a means of social control. Rape keeps women in a secondary status in society by closing doors, limiting options and opportunities, and denying autonomy and freedom. Violence and the internalized and constant threat of violence permeates every aspect of women's

⁶Bunch, C. (1990). Women's Rights as Human Rights: Toward a revision of human rights. Human Rights Quarterly, 12, 486-98.

⁷Center for Women Policy Studies. "Violence Against Women as Bias Motivated hate Crime: Defining the Issues." May, 1991.

lives. The fear of rape controls what women wear, where we live, where we work and how we behave. Rape, and the fear of rape, places limits on our liberty and our mobility. Indeed, when a woman is attacked for being in a place where men are safe, it is just as much a bias-related crime as the recent racially motivated murders in Bensonhurst and Howard Beach.¹

CULTURAL MYTHS AND GENDER ROLES

The cultural myth that suggests that rape is a "crime of passion" or a "private act" must be debunked. Such acts are not motivated by passion or provocation, but rather by the hatred, anger and the desire to control a class of individuals - women. Further, the suggestion that acquaintance rape falls outside the ambit of "hate crime" belies an understanding of the motive behind the act. The argument that the relationship between the victim and the perpetrator is the salient factor assumes the legitimacy of male ownership and domination of women.² The notion that violence committed by an acquaintance or partner cannot, by definition, be motivated in major part by women-hating ignores the reality of these crimes against women.

Furthermore, defining rape between intimates as a "private act" reinforces a vicious cycle of violence against women. The "privatization" of rape in the family and the concomitant view of women as chattel led to the cultural acceptance of marital rape.

¹Lopez, Ruth. "Women Speak Out on Attacks", (c) 1990 Chicago Tribune, June 21, 1990.

²Center for Women Policy Studies, "Violence Against Women as Bias Motivated Hate Crime: Defining the Issues." May, 1991.

Indeed, up until 1984, the state could not prosecute a husband for raping his wife since her status - that of wife - made it legally impossible for her to withhold consent. In 1984, just eight years ago, the New York state Court of Appeals removed the last vestige of cultural misogyny by declaring the marital rape exemption unconstitutional. See People v. Liberta, 64 N.Y.2d 152. Now, married women are afforded equal protection under the law.

SUMMARY

Any legislation aimed at hate crimes that fails to include gender sends the not so subtle message that women, and crimes of hate perpetrated against us are inconsequential - that these acts are not "real" hate crimes - a message I am sure neither you nor other members of Congress wish to send to the women of this nation.

Crimes of hate against women are at once invisible and all pervasive in our culture. If you are born female this paradox is difficult to live with. Yet, whenever we as a society attempt to grapple with crimes of hate we never recognize women as a discrete class of victims. Crimes against women however, occur at epidemic proportions. Indeed, the Surgeon General has stated that violence against women is the chief cause of death and injury to women.

Hate against women is as old as time itself and the patterns of hatred are socially ingrained. Notwithstanding this obvious fact, such crimes remain unspoken in our collective discourse. Today in 1992, to keep such acts "in the closet" diminishes us all. Therefore, if this body truly wishes to attack all crimes of hate - women must be included. Anything less would be to create the illusion of protection and to render hate crimes against women invisible once again.

102^D CONGRESS
2^D SESSION

H. R. 4797

To direct the United States Sentencing Commission to make sentencing guidelines for Federal criminal cases that provide sentencing enhancements for hate crimes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 7, 1992

Mr. SCHUMER introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To direct the United States Sentencing Commission to make sentencing guidelines for Federal criminal cases that provide sentencing enhancements for hate crimes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Hate Crimes Sentenc-
5 ing Enhancement Act of 1992".

6 **SEC. 2. DIRECTION TO COMMISSION.**

7 (a) IN GENERAL.—Pursuant to section 994 of title
8 28, United States Code, the United States Sentencing
9 Commission shall promulgate guidelines or amend existing

1 guidelines to provide sentencing enhancements of not less
2 than 3 offense levels for offenses that are hate crimes. In
3 carrying out this section, the United States Sentencing
4 Commission shall assure reasonable consistency with other
5 guidelines, avoid duplicative punishments for substantially
6 the same offense, and take into account any mitigating
7 circumstances which might justify exceptions.

8 (b) DEFINITION.—As used in this Act, the term
9 “hate crime” is a crime in which the defendant’s conduct
10 was motivated by hatred, bias, or prejudice, based on the
11 actual or perceived race, color, religion, national origin,
12 ethnicity, gender, or sexual orientation of another individ-
13 al or group of individuals.

Mr. SCHUMER. I want to thank all four of the panelists.

Let me start with Mr. Riff. First, what is your view of the state of bias crime data collection here in New York? Here in New York, we are trying to do this I guess with more diligence or enthusiasm than some of the other States. How is it going? I ask this because the FBI in its data doesn't give New York a full grade A.

Mr. RIFF. I am somewhat suprised to hear that because I have had personal dealings with the people up in the Division of Criminal Justice Services, who actually have been implementing the mandate under the Federal Hate Crimes Statistics Act.

One has to also bear in mind that New York State has had its own bias crime incident reporting program since 1988. It has its own reporting mechanism, but as I stated in my testimony, it is not mandatory. It is a matter of law enforcement agencies throughout the State reporting on a voluntary basis.

Let it be said, however, that all the larger police forces, whether it is NYPD, Nassau County, Suffolk County, Westchester, Rochester, Syracuse, et cetera, do report faithfully to the Department of Criminal Justice Services. There is the added problem that everybody up and down the line faces budgetary constraints.

I can tell you, because I know the people who handle this data when it is received in Albany, that there are only about 1½ people doing the job for the whole State. And New York is quite probably the State in our Union which experiences the most bias crime of all. So the task that they have at hand is a monumental one, and they are, I think, doing the best that they can.

Mr. SCHUMER. Thank you, Dr. Riff.

Ms. OuYang, I read your suggestion, it wasn't in your oral testimony but in your written, about the checkoff box. I just want to add one more point.

The Sentencing Commission tells us that if our bill is enacted, the forms used by the probation department to prepare the presentencing report will have a place where the officer indicates if the offense was a hate crime. This would answer some of your concerns. But also, again, one of our goals is to make law enforcement, up and down the line, more sensitive to the fact that these crimes exist, and I think that would be helpful. But I thought your suggestion on the checkoff box was a very good idea.

Ms. OUYANG. The checkoff box is one assurance, but again, it goes to the commitment issue: How will the police officers be trained to ask the individual victim, did they perceive it as a hate crime or crime perpetrated against them in part or whole because of racial animus, et cetera, or is it going to be on the individual officer's terms of whether or not that officer felt it was a hate crime. So that is another problem.

Again, I just want to add, the commitment issue, recently last year we testified before the New York Commission on Human Rights, on how to make the police departments more sensitive on these issues, and they claimed they were holding training with community members, instructing the police on how to become more sensitive. But then when we spoke to that person afterward who went to that training, basically he informed us he was told to go to the front of the room and there were police officers who were coming and going and no one was necessarily paying attention

while he was trying to tell them about some of the incidents that were happening and ways in which they could become more sensitive. And the Commission on Human Rights was able to say they held trainings, you know, and that is what I am saying, that was no training.

Mr. SCHUMER. As they say, it is a long, hard road. You can't force people to pay attention. I think one way we could help gain people's attention is by letting them know of the kind of incidents we heard about here this morning. I think that, more than anything else, convinces people about the problem.

Mr. Katz, let me just ask you this question. Could you just illustrate how passage of the hate crime bill such as the one I have introduced, H.R. 4779, would help curb crime aimed at members of the gay community?

Mr. KATZ. First of all, it would send a strong message that crimes of hate against gays and lesbians would not be tolerated by the Federal Government.

I think we have alluded to a lot today that here in New York State, for 5 years, we have been trying to get a bill passed, and the State senate consistently refuses to pass it. Some of the State senators will actually admit that because of the inclusion of the words "sexual orientation"—nowhere in State law do those words appear—and the fact that that keeps coming up, the law won't get passed because of that, it sort of gives a signal to people that it is OK to commit crimes against gays or lesbians. And the fact that the Federal Government will pass a law saying this will not be tolerated will send a message to people like Judge Hampton in Dallas who gave a lighter sentence to a convicted murderer because he killed a gay man.

It is a strong message. But passing laws in and of itself will not solve the problem. It has to be, after you pass the laws, you have to put it into the education system. You have to, when you have multicultural education and talk about tolerance between racial groups and ethnic groups, you also have to include tolerance toward people who may have a different sexual orientation than the majority of the population.

Mr. SCHUMER. Thank you, Mr. Katz.

And finally, Ms. Miccio. This is obviously a question that we have to deal with, as you noted. I included gender in H.R. 4797, but I am going to be asked a lot of questions about that. I know you addressed some of this in your testimony. But just for the record here in your own terms, first, is every rape of a woman a hate or bias crime?

Second, if the answer to the first question is no, how can we tell the difference between a rape that is a bias crime and a rape that is not a bias crime?

Third and finally, what about the rape of a man, could that be a bias crime? I ask these because we want to get your perspective, which is much deeper than, say, mine is. But I am going to be asked these questions as this legislation goes to the Congress.

Ms. MICCIO. Let me use as a context, H.R. 4797 and also the assembly version of the New York State bias bill that was passed a few weeks ago. First, let me turn the question around. I am taking professorial license here.

Mr. SCHUMER. You professors of law always do things like that.

Ms. MICCIO. The question you have asked me, is every rape motivated by gender animus? The word hate is an interesting word to me. To me it is gender animus, religious animus. Is every interracial act, robbery, assault, by the act in and of itself covered by H.R. 4797 or covered by the assembly bill? The answer is no, using the assembly bill as an example, one would have to prove that the act was motivated by the victim's membership in the protected class. This analysis applies to any assault between a black and a white, between a Jew and a Christian, between a straight person and a gay person. The same applies to crimes against women.

The key is whether or not the proposed legislation requires a specific intent or whether it requires a knowing or negligent or reckless state of mind. New York is very clear. Our bill considers these crimes so serious, it requires that the State prove beyond a reasonable doubt that the person who engages in conduct that resulted in either physical injury, rape, sodomy, property damage or death, did so with the specific intent to deprive a person of a civil liberty because of the victim's membership in a protected class.

So the same way you prove any mental state, you would have to prove it where rape is implicated as a bias crime. You would have to have evidence of an individual's mental state. What were the defendant's attitudes about women? The same way if a person walked up to a gay man, hit him over the head with a two by four, and you heard no words whatsoever, even if they were on Christopher Street, known to be a gay enclave in New York City, you would need evidence, here circumstantial, that the crime was committed because of animus.

Mr. SCHUMER. What about rape of a man?

Ms. MICCIO. If you can prove beyond a reasonable doubt that the person was raped because of their gender, because of their race, because of their sexual orientation, then it would fall under the ambit of protection under our assembly version or under H.R. 4797.

Mr. SCHUMER. So I guess you would say it would be rather difficult to prove. Bias crimes are difficult to prove in general, but this one might be more so.

Ms. MICCIO. I think it is very difficult to prove any crime that requires insight into the defendant's mental state at the time the crime was committed. And I think bias-related incidents shall fall under this rubric, so practically speaking, it becomes very difficult.

But I have to agree with Ms. OuYang, the police have to ask pointed questions and not rely on their own internal sonar or radar because most of us carry cultural baggage with us and we pass that evidence through a prism that may refract out a great deal of information.

Mr. SCHUMER. Mr. Sensenbrenner.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

I have a few questions of Dr. Riff and Mr. Katz.

First, Dr. Riff, are you familiar with an article by Susan Gelman, adjunct professor of law at Capitol University Law School entitled "Sticks and Stones Can Put You in Jail but Can Words Increase Your Sentence, Constitutional and Policy Dilemmas of Ethnic Intimidation Laws," published in December of 1991, vol. 39, No. 2 of the UCLA law review?

Mr. SCHUMER. We have our law professors on this side of the table, too.

Mr. RIFF. I am familiar, but not chapter and verse, so please don't—

Mr. SENSENBRENNER. First of all, I would request to have my staff member send you a copy of this, because it specifically tears apart the ADL proposal for penalty enhancements.

I don't subscribe to all of the arguments made by this law professor, and I have never been a law professor, but I do want to ask a question. Let me quote from a part of this article it. It says, "*In People v. Justice*, the defendant was charged with both arson and ethnic intimidation in conjunction with the burning of an African American family's home. Justice allegedly watched the fire from across the street and commented, 'Aren't you glad to have less niggers in your neighborhood,' and said he hated 'niggers'."

The court let the arson charge stand but dismissed the ethnic intimidation charge, finding it unconstitutional. The court first noted a direct first amendment infringement, quoting from the decision.

"It is claimed that the statute prohibits conduct rather than words or expression." This argument has a hollow ring as the punishable conduct, namely physical conduct or damaging, destroying or defacing personal or real property, is already punishable under criminal statute. What is punished is the spoken or written word or expression thereof by conduct.

"There are numerous instances where the statute can be applied to convert conduct, which would normally be a misdemeanor, into a felony merely because of spoken word. For example, A strikes B in the face with his fist, thereby committing a misdemeanor commonly known as assault and battery. However, should A adjust one word such as kraut, wop, frog, honky, nigger, bitch, Hebrew or queer, it becomes a felony. A will be punished not for his conduct alone or misdemeanor, but for using the spoken word."

Now, how do you get around that argument with these types of penalty enhancement statutes? Because in this case that Professor Gelman cited, there the action became a felony simply because the defendant used the word "nigger" twice, according to the testimony. And there you are actually punishing the spoken words which are protected under the first amendment, as repulsive as they may be, while getting around the fact that the defendant did torch an African American family's house.

Mr. RIFF. Right. Thank you very much.

First of all, I would like to emphasize that as I understand the legislation that is being proposed, penalties would be enhanced for already existing crimes. That is the case as well with the New York State legislation.

What we are really looking at is the state of mind of the perpetrator when the crime is committed. We do that with other offenses as well. In murder trials we look at the state of mind of the person, whether the act was premeditated, for example. I am sure other examples could be presented that don't readily come to my mind.

I am not familiar exactly with the instance that you were referring to. But it could be that there was a separate charge which might have had to be proven in a court of law. The way we have

always understood this legislation is that it is not in any way out of tune with other criminal laws. I want to also mention that the aggravated harassment statute in this State has withstood the test of law all the way up to the Supreme Court, and here you have very much a first amendment implication.

Mr. SENSENBRENNER. Doctor, first of all, the chairman has to leave for his speech, so I will yield to him to sign off.

Mr. SCHUMER. Jim has some very valid concerns. I don't agree with him, but he has valid concerns, and I don't want to cut this questioning off because I think it is interesting. I will read it in the record. But I am committed to make a speech at 12:30. So he will close.

I want to thank all the witnesses and everybody here very much for helping. I want to thank you for coming, Jim.

Mr. SENSENBRENNER [presiding]. The specific issues here are on appeal in the Wisconsin and Ohio Supreme Courts. It seems to me this legal argument is going to have to be rebutted if this legislation is going to withstand the scrutiny of the full Judiciary Committee and the Congress.

So given the fact that the issue has been raised, and it gets to my opening statement, where there are significant constitutional implications involved in this, this entire question, I am going to, with a disclaimer that I don't agree with everything that Professor Gelman concludes, simply to make sure the record is complete, I am going to ask unanimous consent that Professor Gelman's article be included in the record. Since I am the only person here to object, it will be included.

[The information follows:]

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ARTICLE

STICKS AND STONES CAN PUT YOU IN JAIL, BUT CAN WORDS INCREASE YOUR SENTENCE? CONSTITUTIONAL AND POLICY DILEMMAS OF ETHNIC INTIMIDATION LAWS

Susan Gellman*

INTRODUCTION

"Sticks and stones may break my bones, but names can never hurt me!" We have all heard it and repeated it since childhood. In recent years, however, many members of the legal, political, and sociological communities, as well as the general public, have begun to question this schoolyard dogma when applied to "ethnic intimidation crimes": violent or harassing offenses motivated by racism, antisemitism, sexism, or other forms of bias. In response to public outrage over such acts, legislative bodies have enacted a wide array

* Adjunct Professor, Capital University Law School; Assistant Public Defender, Ohio Public Defender Commission. J.D. 1986, Ohio State University; M.S. 1980, Columbia University; A.B. 1978, Brandeis University; Counsel for the defendant in the Ohio Supreme Court in *State v. Wyant*, No. 90-CA-2, 1990 Ohio App. LEXIS 5589 (Dec. 6, 1990), *appeal granted*, 60 Ohio St. 3d 703, 573 N.E.2d 120 (1991), and co-counsel in *State v. Van Gundy*, No. 90-AP-473, 1991 Ohio App. LEXIS 2066 (Apr. 16, 1991), *appeal granted*.

I wish to thank the administration, faculty, and staff of Capital University Law School for their invaluable assistance, contributions, and support. Special thanks are due to Dean Rodney Smith and Professors Susan Looper-Friedman and Donald A. Hughes, Jr., and to the library staff. I am particularly indebted to Professor Daniel T. Kobil, Arnold White, Esq., and Benson Wolman, Esq., my *Van Gundy* co-counsel, for their insights, research, and enormous contributions to this Article. Finally, thanks to the Honorable Max Rosenn of the United States Court of Appeals for the Third Circuit for his contributions and consultation.

of statutes separately criminalizing such conduct, or enhancing penalties for certain criminal conduct when it is bias-related or bias-motivated. Those supporting these laws tend to be, predictably, those most actively concerned with the elimination of bigotry and those most supportive of civil rights.

Those who oppose ethnic intimidation laws, or at least who question them most vigorously, do not disagree that bigotry (and certainly bigotry-related crime) is a serious problem. On the contrary, they are also from the ranks of the most civil rights-conscious thinkers and activists. These critics focus on threats to constitutional liberties under the First and Fourteenth Amendments. Their concerns are that these laws tread dangerously close to criminalization of speech and thought, that they impermissibly distinguish among people based on their beliefs, and that they are frequently too vaguely drafted to provide adequate notice of prohibited conduct. In addition, these critics question the wisdom of enacting such laws: even if they can be drafted in a way that does not offend the Constitution, they may ultimately undercut their own goals more than they serve them.

Thus, the debate over these laws is occurring not merely between traditional allies, but between one side and itself. Moreover, whenever either viewpoint prevails, whether in the legislature, the courts, or even in a purely academic argument, its proponents do not seem to be very happy about it. They can see very well their opponents' point of view, and in fact largely agree with it. It is as if everyone involved in the debate over the permissibility and desirability of ethnic intimidation laws were actually on *both* sides at once. This Article is premised on the belief that this "disagreement to agree" indicates that an answer that would not leave everyone, loser or winner, uncomfortable, is not possible as the debate is currently framed: generally, whether ethnic intimidation criminal statutes are constitutional.

In addition to an analysis of the constitutionality of criminal ethnic intimidation statutes, this Article questions whether "super-criminalization" of bias-motivated offenses is a wise and effective approach to the elimination of either the offenses or the bias motives. Criminal sanction is the last resort of government to control actions and beliefs that are not effectively shaped by education and social evolution; resort to special criminalization of bigotry-motivated behavior in fact indicates that as a society we have become so frustrated and cynical that we are ready to give up on the true elimination of bigoted belief, a position we may not be willing to adopt.

Ethnic intimidation laws currently in force take many forms. The most common is a penalty-enhancement approach based upon model legislation drafted by the Anti-Defamation League of B'nai B'rith (hereinafter, "ADL"). Therefore, this Article will use that model statute as the paradigm for discussing the issues of constitutionality and the general soundness of ethnic intimidation laws as a policy matter.

I. OVERVIEW OF THE HISTORY AND DEVELOPMENT OF ETHNIC INTIMIDATION LAWS

The American debate on the proper balance between free expression and protection of those harmed by others' expression is as old as the First Amendment itself. A good starting point for understanding the roots of modern ethnic intimidation laws is the only Supreme Court case reviewing the constitutionality of a group libel statute, *Beauharnais v. Illinois*.¹ The Illinois statute challenged in that case was typical of those adopted by several states following World War II.² It criminalized the public exhibition of any publication which portrayed "depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion" and which exposed "the citizens of any race, color, creed or religion to contempt, derision, or obloquy" or which was "productive of breach of the peace or riots."³ The Court upheld the statute's constitutionality in a five to four decision and affirmed the defendant's conviction. Because Illinois had a history of racial tension, the majority said, the state had a legitimate interest in ensuring "the peace and well-being of the State" by minimizing the effects of speech defamatory of any group.⁴ Justice Black, dissenting, called the statute "expansive state censorship," noting that calling it a "'group libel

1. 343 U.S. 250 (1952). Previously, in *Terminiello v. Chicago*, 337 U.S. 1 (1949), the Court had declined to rule on the question whether a race-baiting address was constitutionally protected. It reversed the defendant's conviction for breach of the peace on the ground that the statute, which criminalized speech that "stirs the public to anger [or] invites dispute," was void for overbreadth. The Court also held that the jury instructions permitted conviction not only for the possible incitement to violence, but for the very anger the defendant had stirred up: "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Id.* at 4.

2. See Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 SUP. CT. REV. 281, 287.

3. ILL. REV. STAT. ch. 38, para. 471 (1949) (repealed 1961), quoted in *Beauharnais*, 343 U.S. at 251.

4. 343 U.S. at 258.

law' . . . may make the Court's holding more palatable for those who sustain it, but [that] the sugar-coating does not make the censorship less deadly."⁵ He concluded, "If there be minority groups who hail this holding as their victory, they might consider the possible relevancy of this ancient remark: 'another such victory and I am undone.'"⁶ Justice Douglas dissented as well, arguing that the group libel concept was an invasion of the right of free expression that could be justified only where the "peril of speech [is] clear and present . . . raising no doubts as to the necessity of curbing speech in order to prevent disaster."⁷

The dissenters' views eventually prevailed in later cases. Although *Beauharnais* has not been expressly overruled, its vitality today is rather doubtful.⁸ In 1964, the Court's ruling in *New York Times v. Sullivan*⁹ established that libel actions brought by public officials are limited by the First Amendment's free speech and free press guarantees. The Court stressed the existence of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."¹⁰ Then, in *Brandenburg v. Ohio*,¹¹ the Court reversed the conviction of a Ku Klux Klan leader who had been charged with advocating political reform through violence and with assembling with a group formed to teach criminal syndicalism. The Court held that even expression advocating violence was protected by the First Amendment, "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."¹² Because the Ohio statute did not distinguish between advocating a theory and

5. *Id.* at 271 (Black, J., dissenting).

6. *Id.* at 275 (Black, J., dissenting) (paraphrasing PYRRHUS, PLUTARCH'S LIVES § 21).

7. *Id.* at 285 (Douglas, J., dissenting).

8. See *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 331 n.3 (7th Cir. 1985) (subsequent cases "had so washed away the foundations of *Beauharnais* that it could not be considered authoritative"), *aff'd mem.*, 475 U.S. 1001 (1986); *Collin v. Smith*, 578 F.2d 1197, 1204 (7th Cir.) ("It may be questioned . . . whether the tendency to induce violence approach sanctioned implicitly in *Beauharnais* would pass constitutional muster today.") (emphasis in original), *cert. denied*, 439 U.S. 916 (1978); K. GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 294-95 (1989); J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW § 16.32 (3d ed. 1986); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-12, at 861 n.2, § 12-17, at 926-27 (2d ed. 1988); Arkes, *supra* note 2, at 284. If the group libel concept of *Beauharnais* is revived, it may be to provide a basis for upholding the constitutionality of ethnic intimidation laws under the First Amendment.

9. 376 U.S. 254 (1964).

10. *Id.* at 270.

11. 395 U.S. 444 (1969) (*per curiam*).

12. *Id.* at 447 (footnote omitted).

advocating immediate lawless action, it violated the First Amendment.

The problem of ethnic intimidation and the associated legal and moral dilemmas flooded the public consciousness in 1977. The National Socialist Party of America (NSPA), a neo-Nazi group, announced its intention to conduct a march in front of the city hall in Skokie, a Chicago suburb with a large Jewish population, including a substantial number of Holocaust survivors.¹³ After a failed attempt to enjoin the demonstration,¹⁴ the Village of Skokie enacted three ordinances specifically intended to cover Nazi marches.¹⁵ One ordinance conditioned the grant of a parade permit upon meeting three prerequisites. First, the applicants had to obtain an enormous amount of insurance. Second, the Village had to find that the assembly would "not portray criminality, depravity, or lack of virtue in, or incite violence, hatred, abuse or hostility toward a person or group of persons by reason of reference to religious, racial, ethnic, national or regional affiliation." Finally, the applicants had to show that the assembly would not be conducted "for an unlawful purpose." The second ordinance prohibited the dissemination of any materials which "promote and incite hatred against persons by reason of their race, national origin, or religion, and is intended to do so." The last ordinance prohibited public demonstrations by members of political parties while wearing "military-style" uniforms. Each statute created a criminal offense punishable by fine.¹⁶

When the NSPA applied for a permit, proposing to wear uniforms including swastikas, and to carry placards with slogans

13. *Coltin v. Smith*, 447 F. Supp. 676 (N.D. Ill. 1977), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978). For a fascinating and thought-provoking account of the Skokie episode and its aftermath, see A. NEIER, *DEFENDING MY ENEMY* (1979). Neier, the executive director of the American Civil Liberties Union at the time, is a Jew. As a child he escaped from Germany with his parents just before the outbreak of World War II. Nearly all his relatives were murdered in the Holocaust. In addition to the account of the story of Skokie, Neier addresses the question he was most often asked: "How can you, a Jew, defend freedom for the Nazis?" He answers, "I supported free speech for the Nazis when they wanted to march in Skokie in order to defeat Nazis. Defending my enemy is the only way to protect a free society against the enemies of freedom." *Id.* at 1-2. Neier develops this idea throughout the book in a progression of thought that deserves the attention of those examining the philosophical issues surrounding ethnic intimidation laws.

14. See *National Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43 (1977); *Village of Skokie v. National Socialist Party of Am.*, 69 Ill. 2d 605, 373 N.E.2d 21 (1978).

15. 578 F.2d at 1199 & n.3.

16. *Id.* at 1199-200.

such as "Free Speech for White America,"¹⁷ it was denied by the Village on the ground that the NSPA's application indicated an intention to violate the third ordinance. The NSPA's intention to violate the third ordinance, in turn, established an "unlawful purpose" under the first ordinance. The NSPA sought declaratory and injunctive relief against the enforcement of the ordinances. The district court declared the ordinances unconstitutional.¹⁸

The Seventh Circuit affirmed. It began its legal analysis with a condemnation of the behavior it went on to protect:

The conflict underlying this litigation has commanded substantial public attention, and engendered considerable and understandable emotion. We would hopefully surprise no one by confessing personal views that NSPA's beliefs and goals are repugnant to the core values held generally by residents of this country, and, indeed, to much of what we cherish in civilization. As judges sworn to defend the Constitution, however, we cannot decide this or any case on that basis. Ideological tyranny, no matter how worthy its motivation, is forbidden as much to appointed judges as to elected legislators.¹⁹

The court also concluded with a similar declaration of its discomfort.²⁰

The court refused to apply *Beauharnais* to uphold the ordinances.²¹ Instead, it rejected the second ordinance because it was a content-based restriction not permitted under any recognized exception such as incitement to riot under *Brandenburg* or "fighting words" under *Chaplinsky v. New Hampshire*.²² The ordinance did not otherwise satisfy the strict scrutiny standard.²³

In particular, the court rejected the Village's argument that the proposed march would lead to "the infliction of psychic trauma on resident holocaust survivors and other Jewish residents."²⁴ The court recognized that such harm could possibly form the basis for a constitutionally permissible civil action for intentional infliction of emotional distress. It added, however, that

it is nonetheless quite a different matter to criminalize protected First Amendment conduct in anticipation of such results. . . . Where, as here, a crime is made of a silent march, attended only

17. *Id.* at 1200.

18. *Id.*

19. *Id.*

20. *Id.* at 1210.

21. *Id.* at 1204-05.

22. 315 U.S. 568, 572 (1942). See discussion *infra* at Subsection III(B)(3)(b).

23. 578 F.2d at 1203-10. See *infra* note 71.

24. 578 F.2d at 1205.

by symbols of and not by extrinsic conduct offensive in itself, we think the words of the Court in *Street v. New York* . . . are very much on point: "[A]ny shock effect . . . must be attributed to the content of the ideas expressed. It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."²⁵

The NSPA never held the march in Skokie. Just a few days before it was scheduled, it won a contemporaneous but much less publicized legal battle allowing it to demonstrate in Chicago's Marquette Park, which had been the NSPA's original choice. Ultimately, about twenty Nazis gathered at the Federal Building Plaza in Chicago for ten or fifteen minutes; there were thousands of counterdemonstrators.²⁶

In the wake of the *Collin* case, the public began to wonder if it would be possible to draft a law that would restrict groups like the Nazis from marching through places like Skokie that could not also be used to stop civil rights demonstrations in Alabama. The ADL, which had been tracking antisemitic vandalism since 1960, began to publish an annual audit of antisemitic incidents reported to its regional offices. It noticed a sharp increase between 1979 and 1981.²⁷ The ADL began actively to support legislation to combat racist and antisemitic crime as part of its response to this trend. In 1981, its Legal Affairs Department drafted model legislation that it proposed for introduction into state codes.²⁸

The original ADL model bill included two components: an institutional vandalism statute, which penalizes individuals who vandalize, deface, or damage places of worship, cemeteries, schools, or community centers; and an intimidation statute,²⁹ which enhances penalties for certain already criminal offenses when they are committed by reason of the victim's actual or perceived race, sex, color,

25. *Id.* at 1206 (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)). The court also invalidated the first ordinance on similar grounds, finding no meaningful distinction between it and the second ordinance with respect to constitutionality. *Id.* at 1207. The Village had conceded the unconstitutionality of the third ordinance, and the court affirmed the district court in that respect as well. *Id.* at 1207-09.

26. A. NEIER, *supra* note 13, at 66-67.

27. CIVIL RIGHTS DIVISION, ADL LEGAL AFFAIRS DEPARTMENT, ADL LAW REPORT: HATE CRIMES STATUTES: A RESPONSE TO ANTI-SEMITISM, VANDALISM, AND VIOLENT BIGOTRY I (1988 & Supp. 1990) [hereinafter ADL LAW REPORT].

28. *Id.*

29. The text of the ADL model statute is set forth *infra* at Subpart III(A).

religion, sexual orientation, or national origin.³⁰ As of this writing, twenty-two states have adopted laws resembling the ADL model intimidation statute.³¹

II. THE PURPOSE OF ETHNIC INTIMIDATION STATUTES

Without question, bigotry-motivated crime, like all bigoted action and expression, causes real and serious harm to its direct victims, to other members of the victims' groups, to members of other minority groups, and to society as a whole. Whatever policy and constitutional problems ethnic intimidation statutes may have, these statutes are the reflection of legislatures' recognition that these harms are real and significant.

In order to evaluate both the constitutionality and the wisdom of ethnic intimidation laws, it is important to understand the nature of the problems these laws are intended to address. Proponents of ethnic intimidation laws contend that bias-motivated or bias-related crimes work substantial damage beyond that created by the same criminal conduct without the bias element. Moreover, the additional harm affects not only the direct victims of the offense, but other members of disempowered groups as well.

Professor Richard Delgado has described some of the special harms of racial insults and epithets in his seminal article proposing a tort action for racial slurs.³² Racial stigma, he explains,

injures the dignity and self-regard of the person to whom it is addressed, communicating the message that distinctions of race are distinctions of merit, dignity, status, and personhood. Not only does the listener learn and internalize the messages contained in racial insults, these messages color our society's institutions and are transmitted to succeeding generations.³³

The psychological harm of race-based stigma is often much more severe than that of other stereotypes, because race is an immutable characteristic (unlike poverty or alcoholism, for example).³⁴ To a great extent, this is also true of the other characteristics included in various ethnic intimidation statutes: religion, national ori-

30. ADL LAW REPORT, *supra* note 27, at 2-3, app. A. As revised in 1988, the model legislation also includes a statistical component, the Bias Crimes Reporting and Training Statute. *Id.* at 2, 3-4, app. A.

31. Thirteen other states have adopted legislation concerning the same type of conduct, but not using the ADL structure. *Id.* app. A.

32. Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

33. *Id.* at 135-36 (footnotes omitted).

34. *Id.* at 136.

gin, gender, sexual orientation, and handicap. Victims of stigmatization begin to doubt their own worth and sometimes even begin to believe the stereotypes. When this happens, they either despise themselves or lose their sense of self altogether.³⁵ These victims may ultimately reject their own identity as members of their group.³⁶

The effects of stigmatization occur on several levels. Psychological responses include humiliation, isolation, and self-hatred. These responses may affect intergroup relations and even relationships within the group.³⁷ Racial stigmatization can also contribute to mental illness and psychosomatic disease. It can lead to substance abuse as victims seek escape. Stress-based hypertension may also be related to racial labeling.³⁸ These psychological injuries may affect victims' careers as well, creating defeatism and expectation of failure.³⁹ Minority group children are particularly vulnerable, exhibiting self-hatred early and coming to question their own intelligence, competence, and worth.⁴⁰

The continued existence of bigotry is evidence that our society has failed to live up to its professed ideal of egalitarianism. Failure of our legal system to provide at least a civil form of redress to victims of bigotry-related harm sends the message that our commitment to that ideal is not so strong as we might like to believe.⁴¹ Moreover, when police protect racist demonstrations and courts treat racist attacks as pranks, their actions may be viewed by members of disempowered groups as government tolerance or even approval. The victims may then begin to see themselves as stateless people.⁴²

35. *Id.* at 136-37.

36. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2337 & n.87 (1989).

37. Delgado, *supra* note 32, at 137; see also K. GREENAWALT, *supra* note 8, at 143 (group epithets and slurs may "have an insidious effect on social relations, reinforcing prejudice and contributing to unjust discrimination, generating resentment and undermining self-esteem among members of the groups about whom the remarks are made, and lowering the quality of public dialogue"); J. GRIFFIN, *BLACK LIKE ME* (1960).

38. Delgado, *supra* note 32, at 137-39; see also Harburg, Erfurt, Havenstein, Chape, Schull, & Schork, *Socio-Ecological Stress, Suppressed Hostility, Skin Color, and Black-White Male Blood Pressure: Detroit*, 35 PSYCHOSOMATIC MED. 276, 292-93 (1973).

39. Delgado, *supra* note 32, at 139-40.

40. *Id.* at 142, 146; see also Lawrence & Gunther, *Good Speech, Bad Speech*, 24 STAN. L. REV. 4, 40 (1990).

41. Delgado, *supra* note 32, at 140.

42. Matsuda, *supra* note 36, at 2338. Professor Greenawalt has criticized this argument:

Indirect victims of bigotry-related crime need not even be of the same ethnicity as the direct victim. When attacks are made on one group, members of other disempowered groups may feel threatened as well: a rash of attacks on African Americans by a racist group may well create apprehension among Asians, Jews, gays, or Hispanics in the neighborhood. Furthermore, bigotry-related crime affects society as a whole, by distancing non-bigoted majority group members from disempowered groups. Majority group members may feel both relief that they are not targets of such attacks, and fear of victimization should they come to be viewed as minority sympathizers.⁴³ Reluctance to be considered a minority sympathizer may also affect political candidates' positions and their advocacy of beneficial social programs.

It is easy to understand why proponents of ethnic intimidation laws are eager to see some sort of governmental response to the serious problems of bigotry, bigotry-related crime, and their social impact. However, the dispute over the constitutionality and wisdom of ethnic intimidation laws is not rooted in disagreement over the existence or severity of the societal ill addressed. The debate is not over whether government ought to take action to eliminate bigotry and its effects, but whether specific types of criminal ethnic intimidation laws are an appropriate means to that end. The answer to that question turns on two issues: first, are these laws constitutionally permissible? Second, if so, are they wise as a matter of policy? That is, assuming government *may* enact this type of statute, will their benefits outweigh their costs, so that we *should* enact

Some proponents of laws of this type [forbidding denigrating remarks] have argued that, if such speech is tolerated, the government is implicitly endorsing a message contrary to fundamental values of our social order, but, at least on superficial analysis, this is not so. The government permits all kinds of speech that is contrary to the dominant and constitutional values of society; that is an aspect of freedom of speech. By its own actions, by regulating the noncommunicative behavior of private citizens, by education and advocacy, the government can promote equality; its allowing of racist rhetoric does not establish its support of racism. Of course, it is possible that in a society in which less privileged members of minorities identify the majority with the government and the government stands by in the face of such disturbing communication, the passivity of the government will be perceived as support, but, if that were the case, more emphasis on the government's direct commitment to positive values of equality and more education about the nature of free speech would seem preferable to suppression of the hated message.

K. GREENAWALT, *supra* note 8, at 299-300.

43. Matsuda, *supra* note 36, at 2338-39.

them? The remainder of this Article addresses those two lines of inquiry.

III. CAN WE SPECIALLY CRIMINALIZE ETHNIC INTIMIDATION? CONSTITUTIONAL CONSIDERATIONS

Even if a law is desirable as a policy matter and effectively meets its goals, it cannot stand if it offends the federal constitution or the state's constitution.⁴⁴ The fact that a statute is enacted in response to a serious and politically sensitive social problem does not excuse noncompliance with constitutional standards or lower those standards.

The various state ethnic intimidation statutes generally operate in one of two ways.⁴⁵ First, most statutes based on the ADL's model legislation act as a penalty bump-up: when the commission of one of a given list of criminal offenses is motivated by bigotry, the offense is more heavily punishable. The offense may even change from a misdemeanor to a felony. The net effect of these statutes is that they punish ordinarily criminal conduct in the usual way, but add an additional penalty for the actor's unacceptable bias motive. This is the type of statute discussed in this Article.

The second approach sees the combined effect of the criminal conduct and the bias motive as greater than the sum of its parts. According to this view, the presence of the bias motive makes a qualitative change in the conduct itself; thus, a completely different act has been committed, with different and more far-reaching ef-

44. As state constitutions vary in their requirements, this discussion addresses only questions of federal constitutional law. An analysis of any specific state's statute must, of course, take into consideration state constitutional limits as well. Indeed, given the "new federalism" currently dominating the federal courts, it has been suggested that failure to raise state constitutional claims in state court amounts to legal malpractice. *State v. Jewett*, 146 Vt. 221, 222, 500 A.2d 233, 234 (1985); see also Brennan, *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 498, 502 (1977); Hingson, *State Constitutions and the Criminal Defense Lawyer: A Necessary Virtue*, THE CHAMPION, Dec. 1990, at 6.

45. Several states have also enacted special reporting laws in order to gather statistical information on hate crimes, as well as statutes requiring education of police and prosecutors on the special problems of hate crimes. See ADL LAW REPORT, *supra* note 27. Similarly, several colleges and universities have adopted anti-"hate speech" rules, some of which have already been the subject of litigation. See, e.g., *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989); see also Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484. These statutes and rules are part of overall schemes to reduce ethnic intimidation. As they do not impose criminal penalties and are in some cases in force at private institutions, they are beyond the scope of this discussion.

fects.⁴⁶ Thus, this approach includes both penalty enhancement laws, and laws describing very specific behavior, such as placing a burning cross or Nazi swastika on listed types of property.⁴⁷

There is also a third approach, suggested by scholars but as yet not reflected by legislation. This revisionist view advocates the creation of a new class of unprotected speech under the First Amendment. That approach would permit much more far-reaching legislation than is possible under current First Amendment jurisprudence.⁴⁸

A. *The ADL Model Statute and Its Progeny*

Statutes based on the ADL model take a specified list of existing criminal offenses, such as menacing, trespass, assault, and telephone harassment,⁴⁹ and increase the penalty where the offender was motivated by bias. The ADL's revised model intimidation statute reads:

Intimidation

A. A person commits the crime of intimidation if, by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals, he violates Section — of the Penal Code [insert code provision for criminal trespass, criminal mischief, harassment, menacing, assault and/or any other appropriate statutorily proscribed criminal conduct].

B. Intimidation is a — misdemeanor/felony [the degree of criminal liability should be made contingent upon the severity of the injury incurred or the property lost or damaged].⁵⁰

46. This approach is discussed *infra* at Subsection III(B)(3)(b).

47. See, e.g., D.C. CODE ANN. § 22-3112.2 (1989); ST. PAUL, MINN., LEG. CODE § 292.02 (1990). Statutes and ordinances of this type have been upheld in New Jersey and Minnesota, and struck down in Virginia. See *State v. Davidson*, 225 N.J. Super. 1, 541 A.2d 700 (1988) (conviction under New Jersey's criminal mischief statute upheld without discussion of constitutionality); *Commonwealth v. J.D.*, No. 164285 (Fairfax Co., Va., Fam. Ct. Apr. 18, 1991) (Virginia statute held unconstitutional in juvenile case). The United States Supreme Court has recently granted certiorari in a case challenging a law of this type. *In re Welfare of R.A.V.*, 464 N.W.2d 507 (Minn.) (St. Paul ordinance upheld), *cert. granted sub. nom.* *R.A.V. v. City of St. Paul*, 111 S. Ct. 2795 (1991); see *infra* discussion accompanying notes 100-102.

48. As the "cross-burning" type of statutes vary considerably in their specifics, they are not analyzed generically in this discussion. The revisionist approach is discussed *infra* at Subpart III(B)(3)(b).

49. A related scheme simply provides a penalty enhancement for any criminal offense when committed for reasons of ethnic bias. See, e.g., CAL. PENAL CODE § 1170.75 (West Supp. 1991); cf. FLA. STAT. § 775.085 (1991).

50. ADL LAW REPORT, *supra* note 27, app. A.

Some states' variations of this model specify that the offense is one degree higher than the underlying offense committed without the bias motive.⁵¹

As of this writing, several of these statutes have been challenged on constitutional grounds. A brief review of these decisions discloses that each court reviewing an ADL-type statute has approached the analysis differently.

In *State v. Beebe*,⁵² an Oregon trial court had sustained the defendant's demurrer to a charge of intimidation, holding the Oregon intimidation statute unconstitutional. That statute read, in pertinent part:

A person commits the crime of intimidation in the second degree if, by reason of the race, color, religion or national origin of another person, the person violates [the harassment statute].⁵³

Beebe had been charged with throwing another person to the ground, with intent to harass, annoy, and alarm him, by reason of his race. The trial court invalidated the statute on equal protection grounds, on the surprising theory that the statute improperly distinguished not among different offenders, but among different victims. It explained that the statute "gives greater protection to a victim

51. E.g., OHIO REV. CODE ANN. § 2927.12 (Baldwin 1990); see *infra* text accompanying note 81. Shortly before this article went to press, a Wisconsin appellate court upheld that state's "hate crime" penalty enhancement law over vagueness and overbreadth challenges. *State v. Mitchell*, 163 Wis. 2d 652, 473 N.W.2d 1 (Ct. App. 1991), review granted, No. 90-2474-CR (Wis. Aug. 15, 1991). The Wisconsin legislature is currently considering revisions to that law.

52. 67 Or. App. 738, 680 P.2d 11, appeal denied, 297 Or. 459, 683 P.2d 1372 (1984).

53. OR. REV. STAT. § 166.155 has since been amended and no longer incorporates section 166.065. It now provides, in pertinent part:

(1) A person commits the crime of Intimidation in the second degree if the person:

• • •

(c) Intentionally, because of the person's perception of race, color, religion, national origin or sexual orientation of another or of a member of the other's family, subjects such other person to alarm by threatening:

(A) To inflict serious physical injury upon or to commit a felony affecting such other person, or a member of the person's family; or (B) To cause substantial damage to the property of the other person or of a member of the other person's family.

OR. REV. STAT. § 166.155 (1989). This new statute, too, has recently been upheld over free speech and vagueness challenges. *State v. Hendrix*, 107 Or. App. 734, 813 P.2d 1115 (1991). The *Hendrix* court relied upon *Beebe* in holding that the new statute, too, is directed solely toward preventing the physical injuries, not punishing opinion. *Id.* at 740, 813 P.2d at 1119. However, the court looked only at whether an ethnically motivated attack was *entirely* protected as "expressive conduct," not whether the *additional* penalty for the bias motive, beyond that ordinarily imposed for such an attack, violated the First Amendment. *Id.*

who is assaulted because of his race, color, religion or national origin, than to another person who is assaulted for some other reason."⁵⁴

The court of appeals disagreed. It concluded that the statute did not offer greater protection to any "class," because *anyone* may be a victim of bigotry. Instead, the statute merely "distinguish[ed] between acts of harassment which are motivated by racial, ethnic or religious animus and acts of harassment which are not so motivated."⁵⁵ The court went on to discuss the permissibility of penalty enhancement for unlawful conduct that is racially motivated. The court reasoned that, as the legislature is entitled to exercise its judgment with respect to the relative severity of crimes committed under various circumstances, such as the age of the victim or the purpose of the offender, the court's only role was "to determine whether the distinction made in the severity of the crime bears a rational relationship to a legitimate legislative purpose."⁵⁶ The court further noted that assaultive behavior motivated by bigotry both affects the victim's entire ethnic group and has the potential to "escalate from individual conflicts to mass disturbances." Accordingly, it held⁵⁷ that the distinction was rationally based and the penalty enhancement constitutionally permissible.⁵⁸ Finally, the court also rejected the defendant's challenge to the statute on freedom of expression grounds, under Article I, section 8, of the Oregon constitution, providing no further explanation than that "[t]he statute as applied in this case is directed toward conduct, not speech."⁵⁹

New York's ADL-type statute has survived both First Amendment and equal protection challenges. In *People v. Grupe*,⁶⁰ the

54. 67 Or. App. at 741, 680 P.2d at 13 (quoting district court opinion).

55. *Id.*

56. *Id.*

57. Although the court characterized this conclusion as a holding, it may more properly be seen as a dictum, because the question of the permissibility of penalty enhancement for pure motive does not appear to have been raised by the parties.

58. 67 Or. App. at 742, 680 P.2d at 13.

59. *Id.* It is interesting to note that, just one week before the decision in *Beebe*, the same judge wrote an opinion upholding a different trial court's grant of another defendant's demurrer to charges under the intimidation statute. *State v. Harrington*, 67 Or. App. 608, 680 P.2d 666, *appeal denied*, 297 Or. 547, 685 P.2d 998 (1984). In that case, the trial court had not specified its reasons for ruling in the defendant's favor, and the court of appeals affirmed because it found that the portion of the harassment statute underlying the intimidation charge, OR. REV. STAT. § 166.065(1)(b) (1989), violated Article I, section 8, of the Oregon constitution. Having done so, the court declined to address the question of the constitutionality of the intimidation statute itself. *Id.* at 610, 680 P.2d at 668.

60. 141 Misc. 2d 6, 532 N.Y.S.2d 815 (N.Y. Crim. Ct. 1988).

court denied the defendant's motion to dismiss a charge of aggravated harassment in the second degree under New York Penal Law section 240.30(3), which provides:

A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten, or alarm another person, he:

• • • •

3. Strikes, shoves, kicks or otherwise subjects another person to physical contact, or attempts or threatens to do the same because of the race, color, religion or national origin of such person.⁶¹

Grupe was accused of striking a Jewish man about the face and chest while shouting ethnic slurs, including, "Is that the best you can do? I'll show you Jew bastard."⁶² Grupe raised both equal protection and First Amendment challenges to the statute, on its face and as applied to him. He contended that he was in fact being prosecuted for making an antisemitic statement. Moreover, his potential punishment was one year in jail; the same conduct unaccompanied by slurs or with slurs against the victim's family rather than his ethnicity could be punished by only fifteen days. This differential treatment, he argued, was irrational and discriminatory.⁶³

The criminal court of the City of New York denied Grupe's challenges. As to the First Amendment question, it noted that a defendant could violate the statute "while remaining entirely mute."⁶⁴ The statute, said the court, is intended to regulate only violent conduct, not "to prohibit bigotry itself."⁶⁵ The court maintained that, at best, any expression involved would be "fighting words" under *Chaplinsky v. New Hampshire*,⁶⁶ and therefore beyond the scope of the First Amendment's protection.⁶⁷ Even if the defendant's actions had sufficient communicative value to merit First Amendment protection, the court continued, those actions combined both speech and conduct. Therefore, the court concluded, the statute was permissible under *United States v. O'Brien*⁶⁸ as furthering an important governmental interest unrelated to the

61. N.Y. PENAL LAW § 240.30(3) (McKinney 1988).

62. 141 Misc. 2d at 7, 532 N.Y.S.2d at 817.

63. *Id.*

64. *Id.* at 9, 532 N.Y.S.2d at 818.

65. *Id.*

66. 315 U.S. 568 (1942).

67. 141 Misc. 2d at 9-10, 532 N.Y.S.2d at 818; see *infra* Subsection 111(B)(3)(b).

68. 391 U.S. 367 (1968).

suppression of free expression and only incidentally restraining First Amendment liberties.⁶⁹

The equal protection challenge failed as well. The court drew an analogy to a New York Court of Appeals case upholding the propriety of treating juveniles who, in committing a felony, injured a victim over age sixty-one, more severely than those who injured younger victims. The court in that case, *In re Quinton A.*,⁷⁰ had rejected the suggestion that the statute should be reviewed under the strict scrutiny standard, because only the extent and duration of the deprivation of the defendant's liberty were at stake. The *Grupe* court concluded that the legislature's decision to classify bias-motivated harassment as a higher grade offense than harassment otherwise motivated was similarly rational. The court did not discuss whether *Grupe's* First Amendment claim, absent in *Quinton A.*, raised the appropriate level of scrutiny.⁷¹ Applying the more deferential "rational relationship" standard, the court found that the increase in bias-related crimes in New York as well as the emotional impact of those crimes provided a rational basis for differential treatment of offenders who commit "bias-motivated harassment."⁷²

The *Grupe* and *Beebe* decisions evidently did not persuade a Michigan court, which subsequently held that state's ethnic intimidation statute unconstitutional on both vagueness and First Amendment grounds.⁷³ In *People v. Justice*,⁷⁴ the defendant was

69. 141 Misc. 2d at 10-12, 532 N.Y.S.2d at 819-20.

70. 49 N.Y.2d 328, 402 N.E.2d 126, 425 N.Y.S.2d 788 (1980).

71. Statutes that create classifications and infringe on the exercise of fundamental constitutional rights, including First Amendment rights, as well as those that disadvantage a suspect class, are "presumptively invidious." Such statutes must be strictly scrutinized to ascertain whether they are "precisely tailored to serve a compelling governmental interest." *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982).

72. 141 Misc. 2d at 13, 532 N.Y.S.2d at 820. The statute upheld in *Grupe* is of questionable validity in light of *People v. Dietze*, 75 N.Y.2d 47, 550 N.Y.S.2d 595, 549 N.E.2d 1166 (1989), which invalidated New York's parallel simple harassment statute on overbreadth grounds that are equally applicable to section 240.30(3).

73. The Michigan statute differs more from the ADL model than do the Oregon, New York, and Ohio statutes. It reads, in relevant part:

(1) A person is guilty of ethnic intimidation if that person maliciously, and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin, does any of the following:

(a) Causes physical contact with another person.

(b) Damages, destroys, or defaces any real or personal property of another person.

(c) Threatens, by word or act, to do an act described in subdivision (a) or

(b), if there is reasonable cause to believe that an act described in subdivision (a) or (b) will occur.

charged with both arson and ethnic intimidation in connection with the burning of an African American family's home. Justice allegedly watched the fire from across the street and commented to other onlookers, "Aren't you glad to have less niggers in your neighborhood?", and said that he hated "niggers." The court let the arson charge stand, but dismissed the ethnic intimidation charge, finding the statute facially unconstitutional.

The court first noted a direct First Amendment infringement:

It is claimed that the statute punishes conduct rather than words or expression. This argument has a hollow ring, as the punishable conduct, namely physical contact or damaging, destroying, or defacing real or personal property, is already punishable under other criminal statutes. What is punished is the spoken or written word or expression thereof by conduct. There are numerous instances where this statute can be applied to convert conduct, which would normally be a misdemeanor, into a felony merely because of the spoken word. For example, A strikes B in the face with his fists thereby committing a misdemeanor commonly known as assault and battery. However, should A add just one word, such as "kraut," "wop," "frog," "honkie," "nigger," "bitch," "Hebrew," "queer," it becomes a felony; and A will be punished not for his conduct alone, a misdemeanor, but for using the spoken word.⁷⁵

Next, the court found the statute overbroad, citing the facts of the case before it as an example: the defendant was not alleged to have uttered any remarks to the victims, or any prior or contemporaneous remarks to anyone else; the ethnic intimidation charge was supported solely by remarks he allegedly made to friends *after* the arson was committed, and while he was apparently drunk.⁷⁶ Finally, the court held that the statute was fatally vague. First, it did not adequately define "intimidate" or "harass." Also, persons of ordinary intelligence cannot be expected to foresee whether "others (police, prosecutor, court, or jury) will at some later time determine that the contemplated words or conduct give rise to an inference that he or she intended to intimidate or harass."⁷⁷

(2) Ethnic intimidation is a felony punishable by imprisonment for not more than 2 years, or by a fine of not more than \$5,000.00, or both.

MICH. COMP. LAWS ANN. § 750.147b (West 1991). The court's emphatic rejection of the statute is particularly notable because this statute avoids some of the constitutional flaws of the ADL model with respect to vagueness, overbreadth, and creation of a thought crime. See discussion at *infra* sections III(B)(2) and (3).

74. No. 1-90-1793 (Mich. Dist. Ct. 1990). As of this writing, an appeal is pending of the dismissal of the ethnic intimidation charge in *Justice*.

75. *Id.* at 6.

76. *Id.* at 6, 8.

77. *Id.* at 7.

Ohio's ethnic intimidation statute closely follows the ADL model. In two cases, *State v. Van Gundy*⁷⁸ and *State v. May*,⁷⁹ appellate courts have held the statute unconstitutional; in a third, *State v. Wyant*,⁸⁰ the statute has survived a constitutional challenge, but on much more limited constitutional grounds than were raised in either *Van Gundy* or *May*. The Ohio statute reads:

Ethnic Intimidation

(A) No person shall violate [sections of the Ohio Revised Code defining the offenses of menacing, aggravated menacing, criminal damaging or endangering, criminal mischief, and telephone harassment] by reason of the race, color, religion or national origin of another person or group of persons.

(B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation.⁸¹

In *Van Gundy*, the trial court found the statute unconstitutional and granted the defendants' motion to dismiss the ethnic intimidation charges. It held that the statute was unconstitutionally vague because of several flaws, and therefore provided "no objective standard to guide a citizen . . . as to the actions proscribed."⁸² First, the relationship between the ethnic intimidation statute and the referenced code sections was unclear. Second, the statute did not adequately define "by reason of." Third, it did not set forth an acceptable culpable mental state. Fourth, the statute did not specify whether the "race [etc.] of another" language referred to the ethnicity of the victim(s) or of someone else. Finally, said the court, the ethnic intimidation statute invited arbitrary enforcement and selective prosecution.⁸³ The court did not discuss what the appropriate level of scrutiny should be. Nonetheless, the court noted that the statute did not meet even the deferential rationality standard, as it bore no reasonable relationship to a legitimate public purpose: the penalty would be enhanced for merely threatening to commit an act

78. No. 90 AP-473, 1991 Ohio App. LEXIS 2066 (Apr. 16, 1991), *appeal granted*. The author is co-counsel for one of the defendants in *Van Gundy*.

79. No. 12239, 1991 Ohio App. LEXIS 3051 (June 27, 1991).

80. 1990 Ohio App. LEXIS No. 90-CA-2, 3589 (Dec. 6, 1990), *appeal granted*, 60 Ohio St. 3d 703, 573 N.E.2d 120 (1991). The author is counsel for the defendant in *Wyant*. As of this writing, appeals to the Ohio Supreme Court are pending in *Van Gundy*, *May*, and *Wyant*.

81. OHIO REV. CODE ANN. § 2927.12 (Baldwin 1990).

82. *State v. Van Gundy*, No. 89-CR-11-5166, slip op. at 2 (Franklin Co. C.P. Mar. 28, 1990).

83. *Id.*

of violence, but not for actually carrying out the act.⁸⁴ The court added that the statute was also void for its chilling effect on First Amendment speech and association rights: "In effect, this statute would enhance the punishment of a crime based upon the thoughts of the defendant, a hideous concept and inimical to American jurisprudence."⁸⁵

The court of appeals unanimously affirmed the trial court's dismissal of the ethnic intimidation charges on both vagueness and First Amendment grounds. It first noted that the Ohio statute does not give fair warning of the prohibited conduct, because it is unclear "upon whose sensitivity a violation must depend." Moreover, the statute does not indicate who the other "person or group of persons" must be.⁸⁶ More important, the statute encourages arbitrary and discriminatory enforcement by "furnish[ing] a convenient tool for harsh and discriminatory enforcement by local prosecuting officials against particular groups who are deemed to merit their displeasure."⁸⁷

The court also affirmed the lower court's First Amendment ruling. It held that "[t]he statute makes a crime out of what, under the Constitution, cannot be a crime since it is aimed directly at activity protected by the Constitution."⁸⁸ Furthermore, the court noted, as the spoken word is in most cases the only evidence of the bias element, the statute in effect punishes protected speech.⁸⁹

The same result was reached in *May* in an analysis focused solely on vagueness concerns. The statute in *May* was found unconstitutionally vague by the court for two reasons. First, the "by reason of" language did not describe any statutorily cognizable mental state, as required by Ohio law.⁹⁰ Second, the statute did not clarify whose ethnicity was at issue.⁹¹ Having so held, the court declined to reach the defendant's equal protection and First Amendment challenges to the statute.⁹² The court of appeals unan-

84. *Id.*

85. *Id.* at 2-3.

86. *State v. Van Gundy*, 1990 Ohio App. LEXIS 2066, at *9.

87. *Id.* at *10 (citing *Thornhill v. Alabama*, 310 U.S. 88 (1940)).

88. *Id.* at *14.

89. *Id.* at *14-*15.

90. OHIO REV. CODE ANN. § 2901.21(A)(2) (Baldwin 1990).

91. *State v. May*, No. 89-CR-4687, slip op. at 5-6 (Montgomery Co. C.P. May 5, 1990), *aff'd* 1991 Ohio App. LEXIS 3051 (June 27, 1991).

92. *Id.* at 6. The *May* court, like the *Van Gundy* court, gave no indication of the facts alleged by the state.

imously affirmed, adopting the reasoning of the appellate court in *Van Gundy*.⁹³

Wyant is the only Ohio case with a factual record. The defendant, Wyant, who is white, and the complainant, White, an African American, were camping on adjacent sites at a state park. Earlier in the week, the Wyant party had rented the White campsite in addition to their own site, but decided not to renew it. When the Wyant group later changed their minds, White had already rented it. During "quiet hours" that evening, White complained to park authorities about a loud radio at the Wyant campsite. A park official ordered the Wyants to turn off the radio. After he left, White and his companion observed what they later described as "restlessness" at the Wyants' campsite, and heard conversation which they could not make out, except for three comments they believed were intended for their ears: "We didn't have this problem until those niggers moved in next to us"; "The black mother fucker over there, I will take my gun and kill him"; and "In fact, I will go over there and beat his black ass now."⁹⁴ There was no allegation that Wyant moved toward White or had a firearm. Based on these events, Wyant was convicted of ethnic intimidation, predicated on aggravated menacing. He was sentenced to eighteen months imprisonment, the maximum penalty for ethnic intimidation.⁹⁵

On appeal, Wyant challenged the statute on equal protection and vagueness grounds. However, the court of appeals stated that for procedural reasons it would consider only a facial challenge to the statute, and only on free speech grounds.⁹⁶ Nonetheless, its holding was that the statute was *not vague or overbroad as applied* to Wyant.⁹⁷ According to the court, the defendant's "violation of [the aggravated menacing statute] involved the use of racial slurs which were likely to cause a breach of [the] peace." Therefore, Wyant's conviction was found valid under *Chaplinsky*.⁹⁸ The dissent-

93. *State v. May*, No. 12239, 1991 Ohio App. LEXIS 3051 (June 27, 1991).

94. *State v. Wyant*, No. 90-CA-2, 1990 Ohio App. LEXIS 5589 (Dec. 6, 1990), at *2, *appeal granted*, 60 Ohio St. 3d 703, 573 N.E.2d 120 (1991).

95. Had Wyant been convicted of aggravated menacing, the maximum penalty would have been six months imprisonment.

96. The court stated that Wyant had waived the other challenges. *Wyant*, 1990 Ohio App. LEXIS 5589, at *4.

97. *Id.* at *5.

98. *Id.*; see the discussion of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), *infra* at Section III(B)(3)(b).

ing judge incorporated in his opinion the entire opinion of the trial court in *Van Gundy*.⁹⁹

The United States Supreme Court has recently granted certiorari in *In Re Welfare of R.A.V.*,¹⁰⁰ a Minnesota case challenging a city's "hate crime" ordinance.¹⁰¹ Although that ordinance is of the more specific "cross-burning" type,¹⁰² rather than an offense level bump-up, the Court's decision in that case will likely affect future analysis of penalty-enhancement type ethnic intimidation statutes. The challenged ordinance in *R.A.V.* provides:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender commits disorderly conduct and shall be guilty of a misdemeanor.¹⁰³

The defendant in *R.A.V.* was accused of having burned a cross inside the yard of an African American family in the middle of the night.¹⁰⁴ The trial court dismissed the charge prior to trial on the ground that the ordinance was overbroad, because it censored expressive conduct in violation of the First Amendment.¹⁰⁵

99. This *Van Gundy* opinion, it will be recalled, declared the statute unconstitutional on both vagueness and First Amendment grounds. See *supra* text accompanying notes 82-85. Neither the trial court in *Wyant* nor the majority on its appeal analyzed the statute for facial vagueness. All of the judges who have done so to date (the trial and unanimous appellate courts in *May* and *Van Gundy*, and the *Wyant* appellate dissenter) have found the statute fatally vague.

This presents an interesting question for the state supreme court: where nine out of nine of the state's judges who have analyzed the statutory language for vagueness have stated that they do not find the meaning and reach of a statute clear, does that statute *per se* give inadequate notice to "persons of ordinary intelligence"? If the answer is yes, would it be different if there were only five judges? One? What about a split? The basic question seems to be whether reviewing courts must choose between allowing lower courts to have, in effect, preemptive power on vagueness questions, and ruling, in effect, that judges whose void-for-vagueness holdings they reverse fall below the standard of ordinary intelligence.

100. 464 N.W.2d 507 (Minn.), cert. granted sub nom. *R.A.V. v. City of St. Paul*, 111 S. Ct. 2795 (1991).

101. ST. PAUL LEG. CODE § 292.02 (1990).

102. See *supra* text accompanying note 47.

103. ST. PAUL LEG. CODE § 292.02 (1990).

104. 464 N.W.2d at 508.

105. *Id.* It has been suggested that the primary impact of *R.A.V.* may be its use by the United States Supreme Court as a vehicle for eliminating the liberal standing rules of the overbreadth doctrine. See Greenhouse, *Justices to Decide if Hate-Crime Law Violates First Amendment*, N.Y. Times, June 11, 1991, at A20, col. 1.

The Minnesota Supreme Court, in an en banc decision, reversed. The court noted that the St. Paul ordinance had a requirement of specific intent to create alarm or resentment.¹⁰⁶ Therefore, "[a]lthough the ordinance should have been more carefully drafted," it could be construed to reach only expressive conduct that amounts to "fighting words" under *Chaplinsky v. New Hampshire*,¹⁰⁷ and thus survived the constitutional challenge.¹⁰⁸

B. Constitutional Infirmities of the Model Statute

Ethnic intimidation statutes are well-intentioned responses by legislatures to the revulsion and apprehension we feel in response to bigotry-related crime. The strong feelings we have about bigotry and our knowledge of its dangers may incline us to overlook the constitutional infirmities of proposed responses, or to discount these infirmities. The importance of the problem addressed, however, does not reduce the necessity of complying with constitutional limits on governmental action: Fourteenth Amendment vagueness and overbreadth issues; First Amendment freedom of thought, expression, and association; and equal protection under the Fourteenth

106. 464 N.W.2d at 510.

107. 315 U.S. 568 (1942); see *infra* discussion at section III(B)(3)(b).

108. 464 N.W.2d at 511. The appeal of *R.A.V.* to the United States Supreme Court will likely involve discussion of the Court's decisions in *Texas v. Johnson*, 491 U.S. 397 (1989), and *United States v. Eichman*, 110 S. Ct. 2404 (1990), both of which struck down anti-flag burning criminal statutes on First Amendment grounds. Both *Johnson* and *Eichman* were 5-4 decisions, rendered before the retirement of Justices Brennan and Marshall. The *Johnson* dissenters focused heavily on the unique symbolic character of the American flag, which suggests that even if a new majority would rule differently in a flag burning case, its holding would be limited to flag contexts. However, it could easily be argued that crosses, swastikas, and the like have at least as much specific symbolism as a flag, and that racism is at least as sensitive an issue as patriotism. Nevertheless, this reasoning might not be applicable to cross-burning statutes, for at least two reasons.

First, although the Court has recently appeared willing to reverse even recent precedents, especially where the earlier decisions were close votes, see, e.g., *Barnes v. Glen Theatre*, 111 S. Ct. 2456 (1991), the *stare decisis* effect of *Johnson* and *Eichman* ought to preclude deciding *R.A.V.* under the reasoning of the *Johnson* dissent as if it, and not the majority opinion, were the law. Second, at least with respect to crosses and other specifically religious symbols, the First Amendment establishment clause ought to preclude government grant of special status of their symbolism. The state cannot, consistent with the establishment clause, claim that it has a compelling state interest in preserving the unique intrinsic meaning of the cross. The government could avoid this problem by arguing, reasonably, that there is an entirely different, nonreligious symbolism inherent in a burning cross. Under that view, however, the state's interest is related to the offense to the audience, and not to the preservation of the symbolic value. Therefore, the reasoning of the *Johnson* dissent would not apply. Moreover, there would be the additional problem that the First Amendment's speech clause would forbid the regulation as viewpoint-based. See *infra* Sections III(B)(3) and (4).

Amendment. After all, we have strong feelings about these constitutional protections as well. As Justice Black, dissenting in *Beauharnais*, observed, "[t]he motives behind the state law may have been to do good. But the same can be said about most laws making opinions punishable as crimes. History indicates that urges to do good have led to the burning of books and even to the burning of 'witches.'"¹⁰⁹

1. Vagueness

In *Grayned v. City of Rockford*,¹¹⁰ the Supreme Court explained why vague statutes offend due process:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic first amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked."¹¹¹

The ADL model statute raises several vagueness concerns, a number of which are suggested by the cases discussed above. First, the statute turns on "the actual or perceived race, color, national origin or sexual orientation of *another individual or individuals*." Presumably, this includes cases in which the direct victim of the underlying offense is of a different ethnicity than the offender. It is probably also intended to include cases turning upon the ethnicity of a third party having some relationship to the victim, the offender, or both, or to the incident. For example, *A*, a white man, angered by the sight of *B*, another white man, kissing an African American woman, *C*, threatens *B*. It seems far less likely that the statute is intended to reach the case in which *A*, a white woman, hearing *B*,

109. *Beauharnais v. Illinois*, 343 U.S. 250, 274 (1952) (Black, J., dissenting).

110. 408 U.S. 104 (1972).

111. *Id.* at 108-09 (citations and footnotes omitted).

another white woman, calling *C*, an African American child, a racist name, threatens *B* in an attempt to protect *C*. Yet in both the case of the "racist meddler" and the case of the "anti-racist champion," *C*'s race is equally at issue; the statute cannot reach one situation without reaching the other. Furthermore, it is completely unclear whether the statute would reach a case in which the ethnicity of completely unrelated persons was at issue: one Jew threatening another in an argument about Yasir Arafat, one white harassing another for supporting Nelson Mandela, one African American destroying another's poster of Madonna, one gay smashing another's Anita Bryant records. Finally, suppose *A*, a bigoted white, engages in telephone harassment of *B*, a white legislator who has introduced legislation protective of minorities. Here, *C* would be "all minority individuals." The model statute gives no guidance whether such a broad, nonspecific group would be a "group of individuals" within its meaning.

The model statute also fails to specify a culpable mental state. Although the underlying offenses may each carry their own culpability standard, it does not necessarily follow that the offense of ethnic intimidation would or even could have a culpable mental state that varies depending upon which underlying offense was committed. Most jurisdictions have a sort of "default" culpability statute, which supplies a minimum culpable mental state for any offense that does not specify one. Section 2.02 (3) of the Model Penal Code is typical: it provides that recklessness will satisfy the culpability requirement of such an offense. The only element in the ADL model statute beyond the elements of the underlying offense, however, is that the offender acted "by reason of" something. Can one "recklessly" have a reason?

If it could be applied, the "knowingly" standard would seem more rational. But even if one has knowledge of his or her reasons, it does not follow that he or she is capable of controlling them. Suppose an "ethnic intimidator" knows that he or she is acting "by reason of" bigoted beliefs. One believes what one believes; unlike a "purpose," which one can change at will, belief and motive are not so clearly volitional. They may change, but not by their holder's will on the spot. If belief is seen as beyond the believer's immediate control, as in the case of "status offenses,"¹¹² then there are addi-

112. Cf. *Robinson v. California*, 370 U.S. 660 (1962) (striking down on Eighth Amendment grounds a California statute criminalizing the status of narcotics addiction).

tional constitutional problems to criminalization: it offends due process to penalize that which cannot be avoided.

The ADL model statute is also vague with respect to mixed motive situations.¹¹³ The statute requires that the offender acted "by reason of" the ethnicity of another, but it does not state whether that person's ethnicity must be the *sole* reason for the offender's actions, whether it must be the *predominant* reason, or whether it may be merely a *substantial* reason, a *significant* reason, a *contributing* reason, a *barely existing* reason, or an *objectively possible* reason. The statute fails to specify the extent to which the ethnicity of another must have motivated commission of the offense. Consequently, the statute provides inadequate notice of what its only independent element proscribes.

The foregoing vagueness problems can probably all be cured by more precise drafting. Another problem is more elusive. Statutes that enhance penalties for offenses which are already criminalized on the basis of motive must steer a treacherous course between the Fourteenth and First Amendments. If a statute following the ADL model is read as doing nothing more than enhancing the penalty for an existing non-vague crime because of the actor's motive, it may survive a vagueness challenge, but it then criminalizes pure thought.¹¹⁴ On the other hand, it can be argued that the presence of the bias motive changes the qualitative character of the underlying crime so drastically that it becomes an entirely different act. In that case, however, the statute may be held void for vagueness, because we can no longer rely upon the understood meaning of the predicate offense for notice of proscribed behavior. In other words, if the statute does not criminalize pure motive, because the sum of the act plus the motive is greater than its parts, that "sum" is not defined by the statute, and the statute is unconstitutionally vague.¹¹⁵

113. Such situations arose in *Wyant* and *Grupe*, for example, and appear in nearly every ethnic intimidation case to date. Even in the civil anti-discrimination context, discriminatory intent must be at least a "substantial" factor in a mixed motive context. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). Several Justices in *Hopkins* pointed out that, because a defendant may rebut a *prima facie* case of employment discrimination by showing it would have taken the same employment action without consideration of the improper factor, the improper factor must in fact be a "but for" cause. 490 U.S. at 261 (O'Connor, J., concurring in the judgment), 279 (Kennedy, J., dissenting).

114. See *infra* discussion at section III(B)(3).

115. The most obvious means of avoiding the Scylla of thought crime and the Charybdis of vagueness would appear to be enactment of less expansive statutes that criminalize only specifically terroristic acts. That approach, however, requires sacrificing the broad reach evidently intended by the ADL in this model statute. In fact, the

2. Overbreadth: Chill of Speech, Thought, and Association

One of the chief difficulties in drafting an ethnic intimidation statute is making it broad enough to be effective without reaching the point of unconstitutional overbreadth.¹¹⁶ A law will be held facially void for overbreadth "when (1) the protected activity is a significant part of the law's target, and (2) there exists no satisfactory way of severing the law's constitutional from its unconstitutional applications so as to excise the latter clearly in a single step from the law's reach."¹¹⁷

The Supreme Court has invalidated for overbreadth other statutes that sought to punish offensive expression. In *Gooding v. Wilson*,¹¹⁸ the Supreme Court considered a Georgia statute which penalized any "person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . ."¹¹⁹ The Court struck down the statute on both vagueness and overbreadth grounds "because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression."¹²⁰ Similarly, in *Lewis v. City of New Orleans*,¹²¹ a city ordinance that made it a crime for any person "wantonly to curse or revile or to use obscene or opprobrious language"¹²² was held "constitutionally overbroad and therefore facially invalid" because it was "susceptible of application to protected speech."¹²³

ADL has already drafted statutes criminalizing specific acts, including one that criminalizes institutional vandalism. See ADL LAW REPORT, *supra* note 27.

116. "A law is void on its face if it 'does not aim specifically at evils within the allowable area of [government] control, but . . . sweeps within its ambit other activities' that constitute an exercise of protected expression or associational rights." L. TRIBE, *supra* note 8, § 12-27, at 1022 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940)); see also *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

117. L. TRIBE, *supra* note 8, § 12-27, at 1022.

118. 405 U.S. 518 (1972).

119. *Id.* at 519.

120. *Id.* at 521. Note that the Court's holding depended upon its determination that the Georgia statute did not include any "fighting words" standard under *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942). See *infra* Subsection III(B)(3)(b). The statute was held overbroad because it prohibited expression beyond that denied First Amendment protection under the *Chaplinsky* rule.

121. 415 U.S. 130 (1974).

122. *Id.* at 132 (quoting New Orleans Ordinance, 828 M.L.S. § 49-7).

123. *Id.* at 134.

Although statutes based on the ADL model include illegal conduct as well as offensive expression or motivation, they may likewise sweep within their ambit constitutionally protected expression, association, and thought. The model statute does not include the making of bigoted statements as an element of the offense, but its enforcement must inevitably—and probably exclusively—rely upon defendants' speech and associations for evidence of the motive it seeks to punish. In practical effect, then, the model statute threatens to penalize the speech and associations themselves. While it is true that the First Amendment does not per se prevent use of a defendant's words as evidence of other elements of a criminal offense, the danger remains that the defendant will in fact be punished for his or her words, and not for the conduct evidenced thereby.

This "evidence as element" problem arose in *Tygett v. Washington*.¹²⁴ Tygett, a police officer, had been discharged on the basis of his alleged "unsatisfactory attitude." Judge Spottswood Robinson III, writing for the majority, held that the dismissal violated Tygett's rights under the First Amendment because

[t]he words appellant spoke were the only indicia of his attitude, and the attitude was inseparably intertwined with the content of the statements And it is clear beyond peradventure that but for the remarks . . . appellant would not have been dismissed from the police force. *The First amendment's Free Speech Clause cannot be laid aside simply on the basis that the speaker was penalized not for his speech but for a state of mind manifested thereby.*¹²⁵

The ADL model statute manifests the same shortcoming. The distinction between the use of the actor's words as the sole—and perhaps the only possible—evidence of an element of an offense, and their use as an actual element of the offense, is so fine as to be often nonexistent. With respect to pure thought, the distinction reaches the vanishing point: motive *is* an element of the offense.¹²⁶ This is not the case in other contexts in which speech is used as evidence of an element of an offense. For example, introduction of evidence that a defendant used a note in a bank robbery or divulged information in an antitrust violation would not infringe First Amendment rights. In those cases, there is no likelihood of confusing the speech itself with the elements of the offenses evidenced thereby. There is no risk of chilling protected thought, speech, or

124. 543 F.2d 840 (D.C. Cir. 1974).

125. *Id.* at 843 (emphasis added); see also *Cleveland v. Mechanic*, 26 Ohio App. 2d 138, 270 N.E.2d 353 (1971).

126. See *infra* Subsection III(B)(3)(a).

association. The illegal conduct consists of a verbal act, but the actor's beliefs, opinions, and ideas are not at issue. By contrast, the ADL model statute is directed specifically toward the harboring and expression of bigotted sentiments; without them, there is no violation of that statute.

The Supreme Court has consistently resolved this "evidence as element" problem in favor of protecting First Amendment rights. In *Street v. New York*,¹²⁷ the defendant was charged under a statute that criminalized both public mutilation of a flag and "publicly . . . defy[ing] . . . or cast[ing] contempt upon [an American flag] by words." The defendant had set fire to a flag on a street corner and then had said, "We don't need no damn flag."¹²⁸ The Court held that Street could not be convicted for his casting contempt upon the flag by words, and refused to uphold the conviction under the mutilation provisions because it found it impossible to say that his "words were not an independent cause of his conviction."¹²⁹ The Court stressed that it could not "sustain a conviction that may have rested on a form of expression, however distasteful, which the Constitution tolerates and protects."¹³⁰

In addition to any words that a person may speak during, just prior to, or in association with the commission of one of the underlying offenses, all of his or her remarks upon earlier occasions, any books ever read, speakers ever listened to, or associations ever held could be introduced as evidence that he or she held racist views and was acting upon them at the time of the offense. Anyone charged with one of the underlying offenses could be charged with ethnic intimidation as well, and face the possibility of public scrutiny of a lifetime of everything from ethnic jokes to serious intellectual inquiry. Awareness of this possibility could lead to habitual self-censorship¹³¹ of expression of one's ideas, and reluctance to read or listen publicly to the ideas of others, whenever one fears that those

127. 394 U.S. 576 (1969).

128. *Id.* at 589 n.10.

129. *Id.* at 589.

130. *Id.* at 594.

131. The possibility of self-censorship is only as great as the public awareness of the statute, of course. But this is equally true of the deterrent effect of the statute with respect to constitutionally restrictable conduct. If the statute is so universally unknown that there could be no possibility of self-censorship of protected thought and speech whatever, then the statute would also be useless in deterring anything else. It seems likely, however, that public awareness of the existence of this type of statute (if not its details) would be relatively high, as prosecutions under ethnic intimidation statutes tend to draw media attention.

ideas might run contrary to popular sentiment on the subject of ethnic relations.

Self-censorship of bitter invective is not altogether undesirable, of course. Whether its chill by the government is constitutionally permissible, however, is a different question; repugnant or not, racist ideas are indisputably viewpoints on a social and political issue.¹³² Moreover, epithets and slurs are not the only speech chilled by the model statute. A person genuinely wondering about ethnic differences or subjects such as intermarriage, genetic differences, affirmative action, or integration might think twice about airing his or her thoughts, knowing that they could be marched out as damning (or at least embarrassing) evidence in a future ethnic intimidation charge.

It is no answer that one need only refrain from committing one of the underlying offenses to avoid the thought punishment. Chill of expression and inquiry by definition occurs *before* any offense is committed, and even if no offense is *ever* committed. The chilling effect thus extends to the entire populace, not just to those who will eventually commit one of the underlying offenses.

Selective enforcement based on speech and opinion is another danger inherent in the model statute. Prohibitions on offensive belief and expression create an "obvious invitation to discriminatory enforcement."¹³³ Particularly disturbing is the possibility of the statute's vindictive application to young members of disempowered groups who had been annoying majority group member police officers, perhaps calling them "honky cops."¹³⁴ Furthermore, any

132. K. GREENAWALT, *supra* note 8, at 143-44; Matsuda, *supra* note 36, at 2351 ("Anyone who wants to say that African Americans and Jews are inferior and deserving of persecution is entitled to. However loathsome this idea may be, it is still political speech.").

133. *Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971). See *Grimm v. Church*, 932 F.2d 674, 675-76 (7th Cir. 1991) (arresting officer in ethnic intimidation case "had heard through his brother-in-law that Grimm had a history of making racial insults"); *People v. Lamkin*, 98 Ill.2d 418, 457 N.E.2d 50 (1983).

134. An African-American man in Florida was recently arrested for telling a white police officer, who had come to his home to break up an argument, "I'll shoot you, you white cracker." The man was charged with assault for the threat, and also for "Evidencing Prejudice While Committing an Offense" under FLA. STAT. § 775.083 (1991), which "bumps up" offenses one level where commission of the offense "evidences prejudice based on the race . . . of the victim." This man, who otherwise would have faced at most one year in the county jail, could have received an unspecified sentence in state prison if he had been convicted. The charges were ultimately dropped for insufficiency of evidence. *Hate-Crime Charge Dropped Against Black Man in Florida*, N.Y. Times, Aug. 31, 1991, at 10, col. 6 (LEXIS, Nexis library, NYT File). See also E. BARENDT, *FREEDOM OF SPEECH* (1983), 163 ("It is ironic that [the British Race Relations Act]

time one of the underlying offenses is committed, and the offender and the victim happen to be of different ethnicities,¹³⁵ there will be the risk of even well-meaning officers and prosecutors adding a charge of ethnic intimidation as well. Where the actor is suspected of being a racist or an antisemite, a police officer could be more likely to investigate and arrest, and a prosecutor to pursue, questionable complaints of an underlying offense, because of the possibility of an additional charge of ethnic intimidation. Indeed, because of our societal consensus that bigots are ignorant, boorish, and even dangerous, it may well be that prosecutors would anticipate an easier time persuading a jury to convict on the more serious charge of ethnic intimidation than they would on the conduct-oriented underlying offense. When any of these situations would occur, it is foreseeable that the model statute would actually operate to inflame, rather than improve, ethnic relations.¹³⁶

3. Creation of a Thought Crime

A related First Amendment concern is the danger that ethnic intimidation statutes directed toward motive criminalize pure thought and opinion. As the Supreme Court has recently reminded us, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."¹³⁷ A legislative scheme which imposes additional penalties upon an offender for his or her bigoted motive defies that bedrock principle. The First Amendment prevents the state from using governmental power to control or penalize thought and opin-

has often been used to convict militant black spokesmen . . ."); K. GREENAWALT, *supra* note 8, at 301 ("it may actually be angry members of the underprivileged groups that end up being prosecuted most often" under "hate speech" laws).

135. The offender's and the victim's being of different nationalities is not required by the language of the model statute, although it is not clear whether the statute would not be so interpreted. The situation in which they are in fact of different ethnicities is one in which this particular problem is more likely to occur.

136. See *infra* Subpart IV(B). As the Supreme Court pointed out in *Coates*, discriminatory enforcement of an overly broad statute can itself become a basis for civil disturbances within a community. 402 U.S. at 416 (citing REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 26-27 (1968)).

137. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

ion,¹³⁸ even when the opinion is repugnant, the state's effort is well-intentioned, and the societal problem addressed is serious.¹³⁹

a. Can the Government Constitutionally Punish Motive?

Under the ADL model, a charge of ethnic intimidation must always be predicated on certain offenses proscribed elsewhere in a state's criminal code.¹⁴⁰ As those offenses are already punishable, all that remains is an additional penalty for the actor's *reasons* for his or her actions. The model statute does not address effects, state of mind, or a change in the character of the offense, but only the thoughts and ideas that propelled the actor to act.¹⁴¹ The government could not, of course, punish these thoughts and ideas independently. That they are held by one who commits a crime because of his or her beliefs does not remove this constitutional shield. Of course, the First Amendment protection guaranteed the actor's thoughts does not protect him or her from prosecution for the associated action. Neither, however, does the state's power to punish the action remove the constitutional barrier to punishing the thoughts.¹⁴²

138. The First Amendment, of course, protects not only individuals' speech, but their very thoughts as well. See *Wooley v. Maynard*, 430 U.S. 705 (1977); see also *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977) ("[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the state.").

139. See *City of Cincinnati v. Black*, 8 Ohio App. 2d 143, 146-47, 220 N.E. 2d 821, 824 (1966):

Bigotry and hatred in the fields of race and religion reflect a mental attitude which does not necessarily become translated into human behavior. Great honor is almost universally paid to that special commandment "that ye love one another." But no means has yet been found or attempted to compel this highly commendable viewpoint by law. Obviously, to do so would border very closely on thought control, which is resisted (even to the extent of permitting bigotry and intolerance), by every legal precept we know.

140. See *supra* Subpart III(A).

141. In order to avoid a determination that an ADL-type statute is void for vagueness, a state defending its constitutionality is forced to argue that the statute serves only to enhance penalties purely for motive. The theory is that (1) the underlying offenses are not vague, and (2) the only other element, the "by reason of the actual or perceived race . . ." phrase, is not vague because it can only mean that the act was motivated by bigotry. This theory is essential to answering a vagueness challenge, because if that language can be read to mean anything else (e.g., that the underlying offense becomes a different act because of the motive, or that the requisite mental state is somehow changed), then its meaning is no longer clear enough to provide adequate notice of what behavior is prohibited. See *supra* Subsection III(B)(1).

142. *United States v. O'Brien*, 391 U.S. 367 (1968); see *infra* Subsection III(B)(3)(b).

There are other thought-related concepts which *are* properly elements of offenses or penalty enhancements. Intent and purpose both affect culpability analyses based on mental state and are used as aggravating factors in penalty imposition. Their existence in all our criminal codes would initially seem to justify criminalization of motive, as well. "Motive," "intent," and "purpose" are related concepts in that they all refer to thought processes. They are legally distinct in crucial respects, however. Motive is nothing more than an actor's reason for acting, the "why" as opposed to the "what" of conduct.¹⁴³ Unlike purpose or intent, motive cannot be a criminal offense or an element of an offense.

Professor LaFave points out that, unlike intent, "motive is not relevant on the substantive side of the criminal law."¹⁴⁴ He gives the following as a classic illustration of the difference: "when *A* murders *B* in order to obtain *B*'s money, *A*'s intent was to kill and his motive was to get money."¹⁴⁵ This is true even with respect to specific intent crimes, for which it is necessary to determine the purpose for which the defendant acted. For example, if *A* breaks into *B*'s house, the act is burglary only if *A* did so for the purpose of committing a crime.¹⁴⁶ LaFave remarks that

it is undoubtedly better, for purposes of analysis, to view such crimes as *not* being based upon proof of a bad motive. . . . [I]ntent relates to the means and motive to the ends, but where the end is the means to yet another end, then the medial end may also be considered in terms of intent. Thus, when *A* breaks into *B*'s house in order to get money to pay his debts, it is appropriate to characterize the purpose of taking money as the intent and the desire to pay his debts as the motive.¹⁴⁷

"Intent" thus refers to the actor's mental state as it determines culpability based on volition, "purpose" connotes what the actor plans as a result of the conduct (LaFave's "medial ends"), and "motive" is the term for the actor's underlying, propelling reasons for acting,

143. See BLACK'S LAW DICTIONARY 810 (6th ed. 1990) ("Intent and motive should not be confused. Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted."); see also *Id.* at 373 ("criminal motive"), 1014 ("motive"), and 1236 ("purpose"); *People v. Weiss*, 252 A.D. 463, 468, 300 N.Y.S. 249, 255 (1937), *rev'd*, 276 N.Y. 384, 12 N.E.2d 514 (1938).

144. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 3.6 at 227 (2d ed. 1986).

145. *Id.*

146. See, e.g., MODEL PENAL CODE § 221.1(1) (1980) ("A person is guilty of burglary if he enters a building or occupied structure, with purpose to commit a crime therein . . . , unless the premises are at the time open to the public or the actor is licensed or privileged to enter.") (emphasis added).

147. W. LAFAVE & A. SCOTT, *supra* note 144, at 228 (emphasis in original) (footnotes omitted).

which may have no direct relationship to the type of conduct chosen.

The distinction becomes more clear upon consideration of the effect of altering the intent or purpose on the legal characterization of the same conduct, as compared to the effect (or lack thereof) of altering the motive. Continuing with the example of burglary, changing the *purpose* of the break-in changes the very nature of the act: if *A* broke into *B*'s house for the purpose of getting *A*'s own property (not a criminal purpose), the act of breaking in is simply breaking and entering or trespass, not burglary, even if *A*'s motive was identical (the desire to pay his debts). By contrast, changing *A*'s *motives*, even to more sympathetic ones (say, the desire to buy a house for the homeless), while his *purpose* was that of committing the crime of theft in *B*'s house, does *not* change the nature of the act: it is still burglary.

Consider death penalty statutes that include as an aggravating circumstance that the victim is a police officer, or that the murder was done for hire¹⁴⁸ or while committing or fleeing a felony.¹⁴⁹ Such laws do not enhance the penalty for murder on the ground that the offender was motivated by the desire to kill a police officer. Rather, they raise the penalty *whenever* the victim is a police officer, without regard to the actor's motivations; there is no requirement that the actor even be aware of the victim's identity.¹⁵⁰ Similarly, penalties are not enhanced because a murder was motivated by the desire to escape detection for a crime. If the murder was committed during or while fleeing a felony offense, the actor's motivations for committing it are irrelevant; they could be entirely unrelated to the offense or escape, and even a hindrance to them. Likewise, murder for hire is a different act than other murder; the state is not seeking to punish or deter the motive of profit-seeking, but the medial end of creating contracts to kill. In each case, the enacting legislature has simply determined that the aggravating circumstance changes the killing into a different *act* than other murders.¹⁵¹

148. See, e.g., OHIO REV. CODE ANN. § 2929.04 (Baldwin 1990).

149. See, e.g., MODEL PENAL CODE § 210.6(3)(c) (1980).

150. See, e.g., OHIO REV. CODE ANN. § 2929.04 (Baldwin 1990).

151. One view of ethnic intimidation statutes is that the bias element alters the nature of the conduct to create a wholly separate offense. See *supra* text accompanying notes 46-47 and *infra* text accompanying note 198. Under that view, the bias element is not significant as the offender's *motive*, but as a part of the victim's injury. Therefore, that view avoids this inquiry whether motive may be additionally punished. As explained elsewhere, however, it creates vagueness problems.

Some crimes are distinguished from others on the basis of the actor's purpose. For example, under Ohio law, one who, by force or threat, removes another from the place where he or she is found is guilty of abduction, a third degree felony.¹⁵² One who does so to hold for ransom, or as a shield or hostage; to facilitate the commission of a felony or flight thereafter; or to engage in sexual conduct against the victim's will, *inter alia*, is guilty of kidnapping, a first degree felony.¹⁵³ Removing or restraining another for ransom, or as a hostage, or for sexual crimes and so forth, creates a different act than a simple abduction. That the actor's purpose is at issue does not transform this scheme into a punishment for motive.

The crime of theft, which the Model Penal Code defines as acting "with purpose to deprive the owner" of property,¹⁵⁴ is illustrative. It focuses on *purpose*, not *motive*. If the actor's purpose in taking the property were other than to deprive another (e.g., a mistake), then the act would not be theft at all. The purpose transforms *what* the actor is doing, not *why* he or she is doing it. The thief's *motive* for taking the property, however, whether hatred of the owner, greed, or a desire to divert it to charity, is entirely irrelevant.¹⁵⁵ Under the ADL model ethnic intimidation statute, by contrast, the underlying acts are already offenses, irrespective of motive.

Circumstances such as self-defense or necessity change the fundamental nature of the act itself so drastically that, in fact, they provide a complete defense to liability for the underlying crime. LaFave states that therefore these defenses are not actually instances in which a good "motive" serves as a defense: "the better

152. OHIO REV. CODE ANN. § 2905.02 (Baldwin 1990).

153. *Id.* § 2905.01.

154. See MODEL PENAL CODE §§ 223.2, 223.5 (1980).

155. For other examples, see MODEL PENAL CODE §§ 224.1, Forgery (including altering another's writing without authority to do so "with purpose to defraud or injure"); 241.7, Tampering With or Fabricating Physical Evidence (including altering a document or thing "with purpose to impair its verity or availability in [an official] proceeding or investigation"); 250.2, Disorderly Conduct (including making unreasonable noise "with purpose to cause public inconvenience, annoyance, or alarm"); 241.3, Unsworn Falsification to Authorities (including making a written false statement "with purpose to mislead a public servant"). Examples abound. In each case, the action would not be criminal at all without the fraudulent, misleading, disruptive, or converting purpose: altering another's writing to correct a typographical error, removing fingerprints from a piece of evidence while trying to clean it, blowing horns at midnight on New Year's Eve, and writing a false statement for an innocent purpose (such as declining an invitation for a social engagement) are not offenses. The purpose of the action, its "medial end," changes the fundamental nature of those acts from innocent to criminally wrongful. The underlying *motives* are irrelevant.

view is that the law is not concerned with motive once facts supporting the defense have been established."¹⁵⁶ Therefore, "when an individual finds himself in a position where the law grants him the right to kill another in his own defense, it makes no difference whether his dominant motive is other than self-preservation."¹⁵⁷

Classification of an offense on the basis of mental state is no more analogous to penalty enhancement for motive.¹⁵⁸ State of mind refers to culpability; it affects exactly *what* was done (e.g., a deliberate act as opposed to an accident), not *why* it was done. If a killer acts "with prior calculation and design,"¹⁵⁹ for example, it makes no difference whether he or she is motivated by jealousy, hatred, bigotry, greed, altruism, or by no reason at all. Mental states form a continuum of culpability of which motive is not a part.¹⁶⁰ Thus, they provide no basis for criminalizing bias motivation.

Turning away from criminal law, it seems that the civil provisions of federal civil rights law dealing with discrimination in employment, housing, and so forth also do not provide a precedent for criminally penalizing motive.¹⁶¹ Discrimination and bigotry are not the same thing: the former is an illegal act, the latter is a constitu-

156. W. LA FAVE & A. SCOTT, *supra* note 144, § 3.6, at 229-30.

157. *Id.* at 230. This point was made quite vividly in *Golden v. State*, 25 Ga. 527, 532 (1858):

One may harbor the most intense hatred toward another; he may court an opportunity to take his life; may rejoice while he is imbuing his hands in his heart's blood; and yet, if, to save his own life, the facts showed that he was fully justified in slaying his adversary, his malice shall not be taken into account.

158. *See, e.g.*, OHIO REV. CODE ANN. § 2901.22 (Baldwin 1990) ("Culpable mental states").

159. *Id.* § 2903.01.

160. *See* MODEL PENAL CODE § 2.02(2) (1980) ("Kinds of Culpability Defined"; includes "purposefully," "knowingly," "recklessly," and "negligently." There is no mention of motive.)

161. The federal criminal antidiscrimination statutes are for various reasons not analogous to the ADL model statute. For example, 18 U.S.C. § 242 (1988), imposes penalties for deprivation of another's civil rights "by reason of his color, or race." That statute is irrelevant to the analysis of the constitutionality of the ADL model statute because section 242 prohibits only action taken *under color of law*; that is, it is directed solely toward state action, not private action. *See also* 18 U.S.C. § 243. This state action requirement is central, not peripheral, to sections 242 and 243. *United States v. Stokes*, 506 F.2d 771 (5th Cir. 1975). These statutes were enacted specifically to enforce the Fourteenth Amendment, which speaks solely to deprivation of rights by *government*. *See United States v. Cooney*, 217 F. Supp. 417 (D. Colo. 1963). Moreover, the Supreme Court has specified that the "by reason of" language in Section 242 does not relate to the offender's motive. *United States v. Classic*, 313 U.S. 299, 326 (1941) (construing former 18 U.S.C. § 52). Section 241 does not require state action, but it does not include any "by reason of . . ." motive element, and refers to specific purposes and effects. *See also* 18 U.S.C. §§ 244, 247 (1988). Section 245 prohibits specifically enu-

tionally protected (albeit odious) attitude. Just as bigotry can exist without being acted upon, discrimination can occur without racist motivation. It is the discriminatory action, and not the racial motive, that Congress intended to prohibit in those statutes.

The structure and operation of the federal civil rights laws themselves illustrate this point. Racial or other animus is not even necessary for liability under those statutes. Consider, for example, employment discrimination under Title VII of the Civil Rights Act of 1964.¹⁶² A prima facie case for discrimination can be made out under Title VII by showing that a specific employment practice has caused a disparate impact upon different groups.¹⁶³ The practice need not be bias motivated. As the Supreme Court pointed out in *Griggs v. Duke Power Co.*, Congress created the Act to address "the consequences of employment practices," not their motivation.¹⁶⁴ This impact analysis is not used to raise an inference of discriminatory motive; it demonstrates that discrimination is equally possible without any motive related to bias.¹⁶⁵

b. Is Bigotry Beyond the Scope of First Amendment Protection?

Even if the First Amendment does not otherwise permit criminalization of pure motive, it may nevertheless be possible to impose a penalty for expression of a motive of bigotry, if bigotry is a

merated acts of discrimination; under that section, as in the civil antidiscrimination laws, the conduct involved is not prohibited without the discriminatory purpose.

162. 42 U.S.C. § 2000e-2 (1988).

163. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989). Thus, even in *Wards Cove*, where the Court sought to prevent "employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances in the composition of their workforces,'" 490 U.S. at 657 (quoting *Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977, 992 (1988)), it upheld the disparate impact test for Title VII employment discrimination claims (although the court's new formulation is far less favorable to employee-plaintiffs than was the test established in *Griggs*).

164. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

165. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977); *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810, 815 (8th Cir. 1983); *Williams v. Colorado Springs, Co. School Dist. No. 11*, 641 F.2d 835, 839-40 (10th Cir. 1981); *Teal v. Connecticut*, 645 F.2d 133, 136 n.5 (2d Cir. 1981); *Grano v. Department of Dev.*, 637 F.2d 1073, 1081 (6th Cir. 1980).

Indeed, "disparate treatment" and "disparate impact" are just different theories used to make out a case for the same discrimination; they are not even addressed separately in the statute. Bias-motivated discrimination and non-bias-motivated discrimination are prohibited and penalized by the statute in exactly the same way, because it is the distinct act of discrimination in employment, irrespective of motive, that is proscribed, and not bigoted thinking. The ADL model statute does just the opposite: where the Civil Rights Act penalizes discrimination *equally* whether or not motivated by racial animus, the ethnic intimidation statute penalizes the prohibited conduct *more* severely when it is so motivated.

class of expression not protected by the First Amendment. Not every type of expression is entitled to First Amendment protection. The Supreme Court in *Chaplinsky v. New Hampshire*¹⁶⁶ set forth the categories of unprotected expression:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."¹⁶⁷

Expressions of bigotry arguably fit into the category of "fighting words." The *Chaplinsky* definition of fighting words, "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace," seems to include ethnic epithets, if not nonverbally expressed bigoted thought; indeed, the Court even referred to "epithets or personal abuse."

The *Chaplinsky* definition actually includes two definitions of fighting words: words "which by their very utterance inflict injury," and words which "tend to incite an immediate breach of the peace." In practice, the fighting words doctrine appears to have been applied only to words "likely to provoke the average person to retaliation, and thereby cause a breach of the peace."¹⁶⁸ Even applying

166. 315 U.S. 568 (1942).

167. *Id.* at 571-72 (footnotes omitted) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940)).

168. *Id.* at 574. This exclusive focus on the "provocation to retaliation" model may stem from the Court's focus in *Chaplinsky* itself. The Court upheld the New Hampshire Supreme Court's decision, quoting its characterization of the statute at issue as prohibiting only words "'such as have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.'" . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight.'" *Id.* at 573.

The *Chaplinsky* standard has been criticized as androcentric. See K. GREENAWALT, *supra* note 8, at 146, 295-98; Matsuda, *supra* note 36, at 2355. This criticism is well-taken. Perhaps even words that would not meet the *Chaplinsky* test, i.e., those that would not provoke the average able-bodied male listener to retaliate, would be equally or more harmful, in other ways, to persons such as small children, elderly persons, or slight women, who are much less likely to be provoked to violence toward a large assailant. However, if the Court's purpose was only to avoid breaches of the peace, not

this narrow definition, courts have been reluctant to uphold convictions under the fighting words doctrine, and the Supreme Court has never done so.¹⁶⁹ Although there are circumstances in which ethnic epithets, like other language, may rise to the level where it could reasonably be foreseen to provoke the average listener to retaliation,¹⁷⁰ it seems unlikely that every expression of bigotry contemplated by ethnic intimidation statutes would come within this provocation definition.

Moreover, even if many fact patterns involving the use of outright racist epithets would be held to be "fighting words" situations, it does not necessarily follow that every other incident of "intimidation" would be. As the Michigan court pointed out from the bench in *Justice*,

Intimidating words are something less than fighting words. As a matter of fact, the word "intimidating" is the exact opposite of the word "fighting." Rather than to incite an immediate breach of the peace as fighting words would do, "intimidate" means "to make one timid or fearful; to frighten or coerce into submission or obedience"; just the opposite.¹⁷¹

The definition of fighting words as those "which by their very utterance inflict injury" appears to be a better fit, at least in those situations where the offender has in fact flung epithets along with committing the underlying crime. It is questionable, however, whether that definition, having long been ignored, could be used to show that expressions of bigotry are a class of speech and thought outside the scope of the First Amendment. Even if the courts would bring this prong of the fighting words definition back into vitality, it is likely that it would be read even more narrowly than the provocation language. After all, the basis for the exclusion of fighting words from First Amendment protection is that they are

offense or fear on the part of the listener, then the standard makes sense (although it may therefore be vulnerable to attack as a "heckler's veto" standard). In any case, it so far remains the standard, and its obvious flaw does not affect the analysis of the model ethnic intimidation statute's constitutional validity under current law.

169. See, e.g., *Lewis v. City of New Orleans*, 415 U.S. 130 (1974) (words conveying or intended to convey disgrace are not "fighting words"); *Gooding v. Wilson*, 403 U.S. 518, 524 (1972) (statute invalid because it was not limited to "words that 'have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed'" (quoting *Chaplinsky*, 315 U.S. at 573); *Cohen v. California*, 403 U.S. 15, 20 (1971) (state was not exercising its police power "to prevent a speaker from intentionally provoking a given group to hostile reaction"); see also Heins, *Banning Words: A Comment on "Words that Wound,"* 18 HARV. C.R.-C.L. L. REV. 585, 587-89 (1983).

170. See *Doe v. University of Mich.*, 721 F. Supp. 852, 862 (E.D. Mich. 1989).

171. Preliminary Examination, Record at 8, *People v. Justice*, No. 1-90-1793 (Mich. Dist. Ct. 1990).

"within the ambit of action rather than speech because there is no intellectual content to be conveyed to the listener, but merely a provocative, emotional message intended and likely to incite an *immediate*, violent response."¹⁷² The "infliction of injury" definition is directed *more* at the communicative content of the speech than is the "provocation to retaliation" definition.¹⁷³

Barring extension of the fighting words doctrine, bigotry is a protected class of expression, unlike obscenity or libel. As the Supreme Court has stated, "We must not confuse what is 'good,' 'desirable,' or 'expedient' with what is constitutionally commanded by the First Amendment."¹⁷⁴ Bigotry is contemptible, unpopular, and anti-social, but there is as yet no authority declaring it an unprotected class of speech or thought.

Some scholars have therefore urged the creation of such a new class of unprotected "hate speech." This revisionist approach questions whether the values of the First Amendment are truly in irreconcilable conflict with the restriction of expressions of bigotry, even "pure speech" unconnected to any underlying crime.¹⁷⁵ Its adherents contend that sanctions on "hate speech" actually serve ultimately to *promote* free speech, because racist speech silences its victims by causing them to fear harm if they speak up for their rights.¹⁷⁶ Professor Matsuda, a leading proponent of this school of

172. J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 8, at § 16.37, at 942-43 (emphasis in original).

173. Professor Tribe notes that the Supreme Court has not entirely "foreclosed the possibility of imposing costs on those whose words inflict injury by their very utterance." L. TRIBE, *supra* note 8, § 12-10, at 856. The examples he gives of laws that could be constitutional are not criminal sanctions, however. These include provisions for "an after-the-fact award of damages for the intentional infliction of psychic trauma," and "a law that sought to protect the victims of rapes or other violent attacks from being assaulted with photographic reminders of the crimes they had suffered." Recognizing that "[s]uch statutes would be constitutionally problematic—the potential for content-specific regulation is always great," he concludes that "legislatures may create remedies for the damage done with words so long as these remedies display sufficient sensitivity to freedom of expression as well." *Id.*

174. *Houchins v. KQED, Inc.*, 438 U.S. 1, 13 (1978).

175. See Matsuda, *supra* note 36; see also Schauer, *The Aim and the Target in Free Speech Methodology*, 83 NW. U.L. REV. 562 (1989); Note, *A First Amendment Justification for Regulating Racist Speech on Campus*, 40 CASE W. RES. L. REV. 733 (1989-90) [hereinafter Note, *Regulating Racist Speech*]; Note, *Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence"*, 99 YALE L.J. 845 (1990); cf. Delgado, *supra* note 32.

176. France, *Hate Goes to College*, ABA J., July 1990, at 44, 46. This would seem to be particularly true in the case of young children, whose development as expressive individuals may be thwarted by exposure to bigotry. See *supra* text accompanying note 40.

thought, contends: "We can attack racist speech—not because it isn't really speech, not because it falls within a hoped-for neutral exception, but because it is wrong."¹⁷⁷ The problem with this justification is that for the government to take the position that certain speech—even popularly condemned speech—is "wrong," not just in its effects, but in the substantive value of its content, is precisely what the First Amendment prohibits. Protection of speech and ideas that offend the majority because of their content is at the core, not the fringe, of the values underlying the First Amendment.¹⁷⁸

Nevertheless, Professor Matsuda's contention that "[i]f the harm of racist hate messages is significant, and the truth value marginal, the doctrinal space for regulation of such speech is a possibility"¹⁷⁹ sounds reasonable, if the point of the First Amendment is to facilitate the societal quest for truth. If so, where there is no truth value, any societal harm ought to provide a significant enough state interest in its avoidance to survive a strict scrutiny analysis.¹⁸⁰ But consider the application of this reasoning to any number of categories of ideas and expression that are less universally rejected than bigotry: for example, the tale of *Cinderella*. Its truth value is obviously negligible at best. The potentially harmful effects of its themes is evident: the story idealizes as its heroine a woman who is a helpless, passive victim, and whose goal is rescue, via marriage, by a powerful male. His actions come not out of sympathy for her situation or a sense of justice, but because he finds her physically pleasing (and only when she has the right clothes and car). The message is arguably a harmful one for each generation of boys and girls that grow up with it. Does this justify government regulation of *Cinderella*, or its adult counterparts in fiction, art, and film? The story of *Robin Hood* glorifies theft. *Gone With the Wind* gives a sympathetic portrayal of slaveholding. There are many themes in literature and art that are arguably socially harmful or even "wrong"; unquestionably, punishment of their expression because a listener might be affected by those themes would be content-based restriction in its purest sense.

The flaw in this revisionist approach is that it ignores that there is more than one value underlying the First Amendment. The revisionist view focuses on only the function of speech as fueling the "marketplace of ideas" necessary to the informed electorate re-

177. Matsuda, *supra* note 36, at 2380.

178. See K. GREENAWALT, *supra* note 8, at 148.

179. Matsuda, *supra* note 36, at 2341.

180. See Note, *Regulating Racist Speech*, *supra* note 175, at 740-41.

quired by a democracy. But the First Amendment protects liberty interests, too.¹⁸¹ The First Amendment is not simply a device to facilitate the search for truth; it exists to protect the expression of ideas by a minority, including those ideas which may ultimately prove to be "wrong" and harmful, from the pressures of the majority.¹⁸²

Matsuda accuses those courts, legislatures, and scholars who have rejected the revisionist invitation to create a new class of unprotected speech of promoting legal protection of racism. She attributes this position to

- (1) the limits of doctrinal imagination in creating first amendment exceptions for racist hate speech;
- (2) the refusal to recognize the competing values of liberty and equality at stake in the case of hate speech; and
- (3) the refusal to view the protection of racist speech as a form of state action.¹⁸³

She adds: "This limitation of imagination is a disability, a blindness, that prevents lawmakers from seeing that racist speech is a serious threat."¹⁸⁴

This characterization ignores the possibility that courts, legislatures, and scholars have, indeed, considered the issues Matsuda raises, and agree with her about the seriousness of the threat, but disagree with her proposed solutions. Matsuda characterizes their failure to agree not as difference of opinion as to the best solution, but as blindness to the problem itself. She notes, however, that "[t]his limited imagination has not affected lawmakers faced with other forms of offensive speech," such as child pornography and defamation.¹⁸⁵ Perhaps, then, it is not that these lawmakers are incapable of recognizing the harms of certain types of expression or of making distinctions based on those harms, or that their (often reluctant) protection of racist speech is necessarily, as she puts it, the result of "selective vision."¹⁸⁶ It may simply be that they do not

181. See C. BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989).

182. See T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 8 (1970).

183. Matsuda, *supra* note 36, at 2375; see also *id.* at 2378 ("To allow an organization known for violence, persecution, race hatred, and commitment to racial supremacy to exist openly, and to provide police protection and access to public streets and college campuses for such a group, means that the state is promoting racist speech.") If so, can we say that the state's allowing religious groups to exist, and protecting their rights of expression, means that the state is promoting *their* religious message, an impermissible state action?

184. *Id.* at 2375.

185. *Id.*

186. *Id.* at 2376.

feel that creation of a racist speech as a new category of unprotected speech is either constitutionally permissible or wise as a matter of policy. In any case, the implication that failure to support a particular approach to the problem of racism indicates sympathy or indifference to racism is both unfair and unsound. Legislators, courts, and scholars may reject the proposed revisionist approach precisely because they are *extremely* concerned about racism and for that very reason are unwilling to support solutions they see as unworkable.

Another school of thought would reject altogether this "categorization" analysis whereby content-based restrictions are permissible only upon the few judicially-defined unprotected classes, without respect to countervailing interests.¹⁸⁷ These writers argue that even expression not within one of the traditionally recognized unprotected classifications should be subject to content-based restriction when competing interests outweigh the liberty interests at stake. To do otherwise allows liberty to trump equality every time, no matter how slight the liberty interest and how great the equality interest, to the point where equality interests are treated as "beneath doctrinal acknowledgement."¹⁸⁸ Tolerance of bigoted expression for the sake of maintaining societal tolerance of unpopular expression generally places the burden wholly upon disempowered groups for the good of all.¹⁸⁹ Moreover, by refusing to look beyond the categorization analysis, courts are freed from the difficult task of balancing liberty and equality interests, and of providing substantive reasons for favoring one over the other.¹⁹⁰

It seems, however, that this approach would require an exception to the strict scrutiny standard for infringing upon First Amendment interests, at least in the case of equality-based challenges. Whether such a major change in First Amendment law would be desirable is an intriguing question, but one that is beyond the scope of the present discussion. For now, this framework, like the revisionist approach, has yet to be adopted in First Amendment

187. See L. TRIBE, *supra* note 8, § 12-18, at 928-44 (describing categorization analysis under the name "two-level theory"); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1490-93 (1975); Schauer, *supra* note 175; Note, *Recent Cases: First Amendment—Racist and Sexist Expression on Campus—Court Strikes Down University Limits on Hate Speech*, 103 HARV. L. REV. 1397 (1990); see also Delgado, *supra* note 32, at 172-73.

188. Note, *supra* note 187, at 1400-01.

189. Lawrence & Gunther, *supra* note 40, at 40.

190. *Id.*

jurisprudence. Consequently, it cannot yet provide a basis for the constitutionality of ethnic intimidation laws.

Even though bigotry is protected by the First Amendment, the government may still infringe upon its expression if it does so in a way narrowly tailored to further a compelling state interest. Bigotry and its expression have a deleterious effect on society, and work their harms beyond the immediate victim.¹⁹¹ Elimination of this social ill could well be considered a compelling state interest. Nevertheless, courts have refused to withdraw the protection of the First Amendment from the expression of antisocial attitudes on the ground that those attitudes themselves harm others.

In a prominent case, the State of Indiana defended a challenge to the constitutionality of an anti-pornography statute on the theory that even legally "non-obscene" pornography socializes people in harmful ways, and is therefore an injury in itself. The Seventh Circuit invalidated the statute, explaining:

Racial bigotry, anti-semitism, violence on television, reporters' biases—these and many more influence the culture and shape our socialization. None is directly answerable by more speech, unless that speech too finds its place in the popular culture. Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and dictator of which thoughts are good for us.¹⁹²

The Supreme Court, too, has consistently adhered to the principle that "the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, *or to the truth, popularity, or social utility of the ideas and beliefs which are offered.*"¹⁹³ Indeed, it is precisely when those ideas and beliefs are

191. See *supra* Part III.

192. American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986). For an interesting and thorough discussion of the constitutionality of this approach to pornography regulation and its relationship to ethnic epithets, see McKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321 (1984); see also K. GREENAWALT, *supra* note 8, at 149-54, 302-09.

The Supreme Court recently indicated that it would adhere to the *Hudnut* reasoning. See *Barnes v. Glen Theatre*, 111 S.Ct. 2456, 2468 (1991) (Souter, J., concurring in the judgment). Justice Souter's concurring opinion in *Barnes* proposed, as a basis for upholding Indiana's public nudity law as applied to nude dancing, that the state had a substantial interest in combatting the "pernicious secondary effects" of nude dancing. The rest of the Court declined to adopt this reasoning.

193. N.A.A.C.P. v. Button, 371 U.S. 415, 444-45 (1963) (emphasis added).

offensive to others that the protection of the First Amendment is necessary.¹⁹⁴

Because ethnic intimidation statutes are directed at conduct in addition to speech or thought, it is sometimes argued that they could be upheld under the rule set forth in *United States v. O'Brien*.¹⁹⁵ Under *O'Brien*, the government may further important interests through regulation which is directed at conduct, but which incidentally infringes upon First Amendment interests, so long as the governmental interest is "unrelated to the suppression" of belief or expression.¹⁹⁶ As the Supreme Court has recently noted, however, where the governmental interest is related to the suppression of expression, *O'Brien's* "less stringent standard" does not apply.¹⁹⁷ Moreover, the *O'Brien* rule does not permit criminalization of thought and expression; rather, it permits regulation of conduct even where that regulation affects First Amendment interests.

In enacting ethnic intimidation laws that enhance penalties for bigoted motivation, a state is not regulating conduct *despite* its expressive elements, but is actually penalizing already proscribed conduct more severely *because* of its expressive elements, whenever that expression indicates that the actor is a racial or ethnic bigot. This penalizing of expression is precisely what the First Amendment forbids. Consider, for example, the case of one who cries, "Teachers ruin kids' lives!" while shooting a teacher. Under *O'Brien*, the First Amendment would not prohibit the government from incidentally infringing on expression by offering the statement as evidence that the killing was intentional, and thereby furthering its legitimate interest in punishing murder. On the other hand, a state could not punish murder as a misdemeanor, yet punish as a felony a murder accompanied by words indicating that the offender hates teachers, in order to promote good attitudes toward education. In such a regulation, the state's interest is directly related to the suppression of expression.

The analysis of the statute's constitutionality under the First Amendment has thus far relied upon the premise that the statute

194. *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting) ("if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate"), *overruled*, *Goward v. United States*, 328 U.S. 61 (1946).

195. 391 U.S. 367 (1968) (upholding the defendant's conviction for burning a draft card).

196. *Id.* at 377.

197. *Texas v. Johnson*, 491 U.S. 397, 403 (1989).

simply punishes the underlying conduct as the criminal code always has, and adds an additional penalty for a bias motive. As noted above,¹⁹⁸ acceptance of this premise may be necessary to avoid a vagueness challenge, but it leads to the conclusion that the statute creates an unconstitutional thought crime. What if, however, the statute is not viewed as merely adding a penalty for motive in addition to the penalty for the underlying crime, but rather as criminalizing an entirely separate act—that is, that the whole of a crime committed in conjunction with the uttering of bias-motivated slurs is greater than the sum of its parts? However, this, in turn, raises this brings us to the predicted vagueness problems: could the statute then be said to give adequate notice of what the “new” conduct is? Moreover, there may be less to this argument than first appears.

The most compelling argument for this view is that while both ethnic intimidation and other harassment by definition threaten their direct victims, ethnic intimidation has a profound threatening effect on other members of the victim's group as well. The “targeted” nature of the crime alarms others in the victim's group who understandably may see themselves at risk more than when a crime has nothing to do with the ethnicity of the victim. It would seem logical to say, therefore, that it is the specificity of the victim's identity inherent in ethnic intimidation offenses that makes them more alarming to others, the “indirect victims.” But is this true? We may feel more terrified and take extra precautions after hearing of a bias-motivated attack on a member of our group than when we hear of “ordinary” crime, but we also feel more terror and take extra precautions when we hear of *entirely random* attacks: poisoned bottles of Tylenol, somebody with a machine gun mowing down McDonald's patrons, or a driver smashing into as many other cars as he or she can on a freeway. The impact on others does not necessarily follow some continuum of victim specificity. *All* crimes have some indirect victims, and some noncriminal conduct does, too. Indeed, all types of disfavored but tolerated expression have indirect victims.

Without relying upon the Indirect victim issue, one could still contend that ethnic intimidation is an entirely separate act from the underlying offense, based on the distinct type of harm to the direct victim. The problem with this argument is the nature of the distinguishing element: the threatening effect to the victim of the bias element, above and beyond the threat created by the underlying

198. See *supra* section III(B)(1).

conduct. That additional impact is in essence nothing more than the offender's beliefs and thoughts, or the effect of their content upon the victim. Can this additional impact constitutionally be punished, even though thought is protected by the First Amendment, and even though beliefs, unlike conduct, are beyond the offender's immediate, volitional control?

In fact, there may already be a "bonus" penalty for bigotry silently present in the administration of viewpoint-neutral criminal codes.¹⁹⁹ Bigotry is odious and shocking to police, prosecutors, and jurors. If a bias element is present, they may see a crime in a situation where they otherwise might not.²⁰⁰ This is not simply a matter of their having less sympathy for bigots (or, more cynically, of their wishing to advertise politically correct views); the ethnic element can truly raise an incident from mere rudeness to criminal harassment. If a person yells, "I'll get you for that, you kike," the police, prosecutor, and trier of fact, as well as the victim himself or herself, may well be more likely to perceive a real threat than if the person had yelled, "I'll get you for that, you jerk."

It is tempting to sacrifice what may seem like a small part of the First Amendment's protection to advance as important a goal as ethnic harmony. Throughout American history, various views have been seen as not only repellent, but dangerous to society. Abolitionism, communism, and opposition to the war in Vietnam were each so viewed in their times. The First Amendment shielded them all, despite their threat to the existing order, not because of their value as ideas, but because of their believers' right to believe them. As the Supreme Court emphasized in *Texas v. Johnson*: "The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole—such as the principle that discrimination on the basis of race is odious and destructive—will go unquestioned

199. In *Barclay v. Florida*, 463 U.S. 939 (1983), the trial judge had imposed the death penalty in part because of the defendant's "race war" motive, and the Supreme Court upheld the sentence as valid. Unlike criminal statutes, which must provide notice generally to the entire populace, many more factors constitutionally may be considered in the sentencing phase than in the guilt phase of trial. This is because sentencing is directed at tailoring punishment to a specific individual. For example, a sentencing judge may take into account that a defendant attends church regularly, has a steady income, and is needed by his family. Could a criminal statute enhance penalties for non-churchgoers, the unemployed, or the lonely?

200. Even in a hypothetical (one hopes) community in which the majority of the people are bigoted, majority-member jurors will still be shocked by a bigotry-related attack by a minority defendant against one of their own. This "one-way" shock effect would create the additional danger of discriminatory enforcement against minorities.

in the marketplace of ideas."²⁰¹ Justice Jackson, writing for the Court in *West Virginia State Board of Education v. Barnette*, eloquently summed up the matter:

[T]he freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion. . . .²⁰²

The ADL model statute seeks to prescribe orthodoxy, albeit a pro-social orthodoxy, in matters of opinion. The drafters of the model statute apparently tried to avoid infringement of First Amendment rights by tying the targeted opinion to conduct. However, although conviction under the model statute requires that the disfavored thought must be coupled with punishable conduct, the statute nevertheless imposes an additional punishment for thinking that thought. The model statute therefore directly violates the First Amendment's protection of thought. Furthermore, the necessarily near-exclusive reliance upon protected speech and association as evidence of the criminalized motive implicates those First Amendment values as well.²⁰³

4. Equal Protection

The equal protection criticisms of the ADL's penalty enhancement-type ethnic intimidation statute track the First Amendment concerns. Briefly, the model statute triggers strict scrutiny on equal protection grounds because it infringes upon fundamental constitutional rights guaranteed by the First Amendment: it treats offenders differently based on the beliefs they hold and express. Under the statute, a person who commits an offense because of some "acceptable" motive is punished more leniently than one who acts out of ethnic bias. The statute is therefore "presumptively invidious" and must be strictly scrutinized to ascertain whether it is "precisely tailored to serve a compelling governmental interest."²⁰⁴ The governmental interest ostensibly served by the statute is the special proscription of crime motivated by racial and ethnic animosity.

201. 491 U.S. at 418 (emphasis added).

202. 319 U.S. 624, 642 (1943).

203. See *supra* section III(B)(2).

204. *Plyer v. Doe*, 457 U.S. 202, 216-17 (1982).

However, it is important to distinguish between the government's legitimate interest in eliminating violent or destructive acts and an interest in eliminating racial hatred and bigotry among private individuals. Criminal conduct is punishable; hate is not. Violent, destructive conduct is already criminalized in every jurisdiction, and has long been so. Clearly, punishing criminal offenses is within the state's police power, but just as clearly, the state is barred by the First Amendment from penalizing the thoughts motivating the offender, however despicable the majority of the populace or the current administration may find them.

Combatting bigotry is a laudable goal. The government may support this goal through education, as well as through vigorous enforcement of content-neutral laws prohibiting violence, harassment, and vandalism.²⁰⁵ However, the First Amendment bars the government from *compelling* adherence to the ideal of interethnic harmony by criminalizing bigoted *motives* for criminal offenses,²⁰⁶ and the Equal Protection Clause prohibits punishing those who hold a particular set of beliefs more severely than other offenders. A state may teach evolution in its public schools, but it may not criminalize creationism, nor may it punish creationists who commit criminal offenses because of their beliefs more harshly than it punishes evolutionists. The distinction between those who commit offenses because they harbor thoughts of bigotry and those who commit the same crimes for other reasons must be strictly scrutinized because it is a distinction between individuals based upon First Amendment interests. The model statute does not survive strict scrutiny because it is overbroad and of questionable utility, and thus not narrowly tailored to serve a state interest in combating bigotry.

205. For an interesting discussion of enforcement issues, see Note, *Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence,"* 99 YALE L.J. 845 (1990). The author argues that existing state criminal statutes leave too much discretion to the prosecutor, and as a result, these crimes are not likely to be prosecuted. She proposes a model statute designed to reduce prosecutorial discretion in order to avoid the effects of unconscious racism.

206. The fact that offenders may have violated other criminal laws "by reason of" their beliefs does not deprive those beliefs of the protection of the First Amendment. If this were the case, the State of Texas, whose flag desecration statute was recently invalidated by the Supreme Court in *Texas v. Johnson*, 491 U.S. 397 (1989), could have achieved its end by the simple expedient of prohibiting public burning (clearly a legitimate exercise of the police power), and then enhancing the penalty for any person who violates the burning statute "by reason of" his or her opposition to the policies of the government.

IV. SHOULD WE SPECIALLY CRIMINALIZE ETHNIC INTIMIDATION? POLICY CONSIDERATIONS

Constitutional permissibility of ethnic intimidation crimes is only the first inquiry, however. Even assuming that constitutional ethnic intimidation laws can be enacted, there remains the question whether their adoption is in society's best interest. These policy concerns include the costs to society as a whole, the costs borne particularly by the disempowered groups ostensibly protected by these laws, and the fundamental question of the general effectiveness of such laws in combating bigotry and encouraging equal dignity.

A. *Costs to Society as a Whole*

The first problem for society as a whole regarding ethnic intimidation laws concerns generally applicable First Amendment values and problems. Beyond the questions of speech infringement, creation of thought crimes, or government endorsement of a particular viewpoint as limitations on the constitutional permissibility of ethnic intimidation statutes, the underlying values of First Amendment jurisprudence inform the debate on whether even constitutionally permissible laws are nevertheless undesirable.

Beginning with the most basic of values underlying the First Amendment, laws which limit or chill thought and expression detract from the goal of insuring the availability of the broadest possible range of ideas and expression in the marketplace of ideas.²⁰⁷ The theory that society will ultimately choose the best ideas depends upon the assumption that people are intelligent and responsible enough to make good, pro-social choices.²⁰⁸ Whenever, even constitutionally and for a good purpose, we restrict the range of

207. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). It may also be argued that expressions of bigotry themselves chill other expression, namely, expression on the part of the objects of that bigotry, who may fear that speaking out will invite bigoted response. The government may pursue constitutional means to remedy this "private sector chill," including education, provision of safe fora, and enforcement of neutral laws. Once again, however, the reality and seriousness of the problem does not relieve the government of the burdens of satisfying the requirements of the Constitution and of carefully weighing the costs of minimal compliance to these requirements' underlying values.

208. See L. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 60 (1986). This assumption may well be inaccurate, or practically so, in the face of the slow pace of social change and the political pressures placed on legislatures. As Professor Lawrence has put it, "Blacks and other people of color are skeptical about the argument that even the most injurious speech must remain unregulated because, in an unregulated marketplace of ideas, the best ones will rise to

ideas or expression that may be selected, we are denying that, left to the exercise of their own judgment, people will reject "bad" ideas. This is troubling for several reasons. First, there is the obvious mistrust of the listening public's judgment. This is a particularly severe insult where, as here, the ideas in question are so abhorrent that not much intelligence or social conscience should be necessary in order to reject them.²⁰⁹ Second, it places the state in the position of arbiter of worthiness of ideas. This situation is not unheard of; however, even when permitted, it raises the specter of "Big Brother" and is tolerated only as a necessary evil for the greater good.²¹⁰ Finally, and perhaps most sobering, it assumes that the government has an accurate understanding of what ideas and expression are in fact intolerably harmful and will enact laws conforming closely to that understanding—a bold assumption to say the least.

Another generally applicable First Amendment concern is the familiar "slippery slope" problem. Any limitation of expressive interests, even when desirable and permissible, represents a small but real sacrifice of some part of our liberty. Where the value of the proscribed expression is deemed very low, the specific sacrifice may be inconsequential, at least to most people. However, the overall constriction of the range and scope of the First Amendment's protection theoretically limits everybody. Moreover, this constriction invites further incursions, perhaps including some which will not be considered inconsequential to as many people. Without the permission given in *Chaplinsky* to criminalize fighting words and obscenity, it would have been much more difficult for proponents of the Illinois statute at issue in *Beauharnais* to argue in favor of its constitutionality,²¹¹ and for the proponents of modern ethnic intimidation laws to argue in those laws' favor.²¹²

the top and gain acceptance. Experience tells quite the opposite." Lawrence & Gunther, *supra* note 40, at 40.

209. See L. BOLLINGER, *supra* note 208, at 60, 67.

210. As noted above, evaluation of the worth of ideas has been permitted in the areas of obscenity and fighting words. Problems of definitions in those areas have been frequent and thorny.

211. The Court in *Beauharnais* did in fact rely on *Chaplinsky*. 343 U.S. at 257.

212. Professor Matsuda calls the "slippery slope" problem "the central civil liberties concern, and argue[s] that it is as well met by narrowly defining racist speech as it is by other First Amendment exceptions." See Matsuda, *supra* note 36, at 2351 n.164. However, Matsuda herself suggests that at least one of those other exceptions, the fighting words exception, is not satisfactory. See *supra* note 168. The obscenity exception, too, has created enormous problems of definition and application for courts throughout its history. If the existing exceptions inadequately or barely meet constitutional standards, then it is damnation by faint praise to argue in favor of a proposed "racist speech" exception that it meets those standards only "as well."

Similarly, there is the "who decides?" problem inherent in any situation in which narrow and value-laden distinctions must be drawn. The drafting of an ethnic intimidation law requires a series of difficult to near-Solomonic decisions. What types of biases are to be addressed? Race, religion, and ancestry only? Sex? Sexual orientation? What types of behaviors should be included? Symbolic acts such as cross-burning only, or existing crimes committed with a bias motive, too? Should intraethnic as well as interethnic situations be covered?²¹³ Should standards be objective or subjective? At what level does behavior descend from merely offensive to criminally intimidating? Is "WASP" as harmful an epithet as "nigger"?²¹⁴ Is "slut" a sexist or a personal slur?

People reasonably differ on all these questions just as they do on the questions of what constitutes obscenity or whether abortion is murder. It will likely be as hard to draw a consensus upon which a legislature could rely as a standard in the ethnic intimidation context as it has been and continues to be in those areas.

There is also a cost to society as a whole whenever expression, even expression arguably valueless in terms of its contribution to the societal search for truth, is not tolerated. Dean Bollinger points out that tolerance of all kinds of ideas, including those that are harmful to society, is itself an important value of American society and a hallmark of our system.²¹⁵ He describes a disjunction between our attitudes toward legal and social coercion of offensive speech. That is, even as we scrupulously guard people's legal right to express odious ideas, socially we both condemn the ideas and shun those who express them.²¹⁶ After all, the impetus behind ethnic intimidation statutes themselves is a pro-social popular reaction to racism, a reaction which has occurred without the context of ethnic intimidation laws.²¹⁷

Moreover, a society's ability to tolerate dissent from even its most basic principles is a sign of that society's strength and of the enduring acceptance of those principles.²¹⁸ The validity of this ar-

213. See Matsuda, *supra* note 36, at 2358, 2361-63.

214. *Id.* at 2361-62; K. GREENAWALT, *supra* note 8, at 147-48.

215. L. BOLLINGER, *supra* note 208, at 9.

216. *Id.* at 39.

217. France, *supra* note 176, at 44.

218. Justice Brennan made this point in the Supreme Court's opinion in *Texas v. Johnson*:

We are tempted to say, in fact, that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and

gument goes beyond its role in determining the constitutionality of laws, to the analysis of their desirability even if constitutional. If the level of our tolerance of expression of ideas threatening to predominant beliefs is a measure of our confidence in the truth and broad acceptance of those beliefs, then erosion of tolerance indicates that we are that much less sure that those beliefs are in fact correct and thus able to withstand challenge.

Even if the threatening ideas are assumed to be false, there is value to the search for truth in tolerating their expression.²¹⁹ Without occasional reminders that there is another, even a "wrong," way to look at something, we are unlikely to think very often about why we look at it as we do, and why it is we think that perspective is "right." Young women who have only rarely encountered overt expressions of sexism, for example, may have more difficulty understanding its seriousness than women who are old enough to remember a time when sexist assumptions were unquestioned and their expression socially acceptable.²²⁰ Taking something for granted is often a forerunner to losing it. When we become complacent about truth, we become flabby in our ability to defend it against a future challenge.

A final set of costs to society generally are those specific infringements on individual liberty raised earlier in the discussion of the constitutionality of ethnic intimidation statutes.²²¹ Even if the problems of vagueness, overbreadth, chill, and thought criminalization do not invalidate these statutes, those problems remain. Some

Inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength. Indeed, one of the proudest images of our flag, the one immortalized in our own national anthem, is of the bombardment it survived at Fort McHenry. It is the Nation's resilience, not its rigidity, that Texas sees reflected in the flag—and it is that resilience that we reassert today.

491 U.S. at 419.

219. Dean Bollinger describes as a primary argument for protection of speech assumed false the need for false ideas as a stimulus to examination and deeper understanding of true ones:

Through confrontation with falsehood, [John Stuart] Mill argued, people retain a "livelier" sense of the truths they themselves already hold but which may have become stagnant. Through censorship, Mill claimed, we "lose, what is almost as great a benefit [as truth], the clearer perception and livelier impression of truth produced by its collision with error." Truth requires regular exercise, as it were, and without it it atrophies into dogma.

L. BOLLINGER, *supra* note 208, at 54-55 (quoting J.S. MILL, ON LIBERTY 21 (C. Shields ed. 1956)).

220. See *Young Feminists Speak for Themselves*, Ms., Mar./Apr. 1991, at 28.

221. See *supra* Section III.

infringements of liberty may be constitutionally permissible, but they are still infringements of liberty. The extent to which constitutional rights were carefully guarded for much of this century can lead us into the trap of confusing the limits of constitutionality with a bottom line for protection of liberty, but this equation does not always lead us to satisfying results. That is, even if we agree that the Constitution does not quite bar the government from conducting random sobriety checks of motorists, searching students' lockers, censoring news reports during wartime, or forbidding Americans' travel to Cuba, we still recognize that those exercises of power are an intrusion into citizens' liberty. Even those intrusions that are permissible and beneficial carry a cost for society generally.

B. *Costs to Disempowered Groups Specifically*

In addition to the costs imposed upon all members of society by the creation of ethnic intimidation laws, there is the risk that additional burdens will be borne by members of the very disempowered groups that these laws are designed to protect. Again, although legislatures may ultimately conclude that the benefits of such laws outweigh the costs, those costs must be considered carefully.

Laws designed to protect people from others' hatred are intended benevolently, but carry an implicit patronizing and paternalistic message: these people are incapable of holding their own without special protection. A statute specifically criminalizing the painting of swastikas on synagogues or public buildings,²²² for example, presupposes a special sensitivity and vulnerability on the part of Jews for which they must turn to the state for protection. Such a unique vulnerability may well exist, and the state's wish to respond to it is praiseworthy. At the same time, however, this recognition of special vulnerability imposes a stigma: it says both that Jews can be hurt more easily than others, and that they are dependent upon the state to protect them from others. The intent and effect are similar to those of laws imposing higher penalties for crimes committed against children and the elderly.²²³ Society wishes to protect them because they are more helpless than others; the protection is beneficial, but it reinforces the belief of weakness.

222. See, e.g., D.C. CODE ANN. § 22-3112.2 (West 1989); N.J. STAT. ANN. §§ 2C:33-10, 33-11 (West 1982 & Supp. 1990).

223. See, e.g., FLA. STAT. ANN. § 775.0836 (West Supp. 1991).

Of course, laws protecting citizens generally, such as harassment statutes, also can be said to recognize individuals' weakness. In the case of an ethnically specific intimidation crime, however, the suggestion is that members of the protected group are weaker than everyone else. Moreover, there is the additional implication that a disempowered group has not been able to win respect from the community at large on its own, and is not expected to be able to do so in the foreseeable future. Recognizing that a group needs special protection from expressions of hatred necessarily includes recognition that the group is hated by a significant number of others. This recognition can suggest, even if only subconsciously, that there might be some valid reason that so many people feel that way.

The stigma operates both upon the disempowered group itself and upon society generally in its view of that group. Members of disempowered groups can lose respect for their groups and for themselves individually in response to paternalistic treatment by the state in much the same manner as proponents of ethnic intimidation laws argue that they do in response to the ethnic intimidation itself. Similarly, just as government inaction in response to ethnic intimidation is said to demean its victims, and perhaps all members of all disempowered groups, in the eyes of the majority, an official position that a certain group is weak and will therefore be afforded government protection could reduce the majority's respect for members of that group.

Affirmative action provides an analogy. White males complain of reverse discrimination, and women and minority men complain that they are perceived as underqualified tokens, less competent than their white male peers who are seen as having succeeded on pure merit.²²⁴ One might consider affirmative action simply the best choice among available flawed approaches to correcting imbalances in the workplace or education, or one might be well-satisfied with affirmative action; but it would take an enthusiasm so zealous as to be blind to drawbacks and deaf to criticism to deny that it has created some problems of its own and occasionally even exacerbated

224. See Wilkerson, *A Remedy for Old Racism Has New Kind of Shockles: Children of Affirmative Action are Ambivalent*, N.Y. Times, Sept. 15, 1991, at 1, col. 1; see also Marriott, *Unresolved: Role of Race in Law Class Admissions*, N.Y. Times, Apr. 28, 1991, at E5, col. 4; Coleman, *An Assault on Blacks*, N.Y. Times, Apr. 28, 1991, at E16, col. 6 (letter to editor) ("Character and ability mean nothing when powerful symbols are used . . . to implant the notion that African-Americans generally owe whatever accomplishments they have achieved to quotas or unfair competition in which whites have been placed at a disadvantage. In the face of such a campaign, our race brands us as inferior; evidence to the contrary is irrelevant or not even acknowledged.").

interethnic tensions. The cure is not worse than the disease, but it has a few side effects that must be considered when administering such strong medicine.

In addition, unless ethnic intimidation laws protect *only* members of minority groups, there is a grave danger that they will be used against leaders of the ostensibly protected groups whenever those leaders inconvenience or criticize the government. After all, the majority administers the law.²²⁵ Minorities may be convicted with disproportionate frequency if predominantly majority-member juries tend to find them more "intimidating" than members of their own groups. Suppose, for example, that an African American defendant is charged with ethnic intimidation based on violation of a menacing statute that defines "menacing" as "knowingly causing another person to believe that the offender will cause physical harm" to that person.²²⁶ White jurors may be more likely to view that African American defendant's actions as "menacing" or as racially motivated than they would a white defendant's identical actions, based upon what they imagine would make *them* feel apprehensive in the victim's place.

Furthermore, in the case of crimes such as menacing, in which the victim's subjective response is an element of the offense, there is the problem of situations in which the victim him- or herself actually does perceive the threat or its bigoted motivation only or partly because of the offender's ethnicity. A jury will be more likely to believe a victim actually felt threatened by a twenty-year-old African American male than by a nine-year-old white female. Which parts of that predisposition of belief would we consider acceptable? It seems fair to allow the offender's age to affect the analysis. What if both offenders are twenty? We may be more troubled by allowing the offender's sex to enter the equation, even if we believe most people would find females generally less threatening than males. Race is the least comfortable of all. Still, if a victim's perception of a threat, fairly or unfairly, *does* depend upon the offender's ethnicity, it must be taken into account in applying a subjective standard. One need not accuse jurors of bigotry to recognize that the analysis the ethnic intimidation statute requires them to undertake forces them to apply biases of which they may not even be aware.

Finally, even assuming only the most benevolent motives of the government, encouragement of dependency upon its protection can

225. France, *supra* note 176, at 48; see also *supra* note 134 and accompanying text.

226. See OHIO REV. CODE § 2903.22 (Baldwin 1990).

be dangerously lulling. The authority that has the power to grant protection has the corollary power to withdraw it at will.²²⁷

C. *Efficacy of Ethnic Intimidation Laws*

The social costs of ethnic intimidation statutes do not necessarily make such laws undesirable. The benefits both to society at large and to disempowered groups may well outweigh the costs. If, however, ethnic intimidation laws do not effectively serve their objectives, then, given their costs, they are not desirable and other approaches are preferable.

As of this writing, only a few courts have ruled on the constitutionality of ADL-type ethnic intimidation statutes. There has been no showing of a decrease or slowed increase in bigotry or bigotry-related crime in jurisdictions where such laws exist. Even in the absence of empirical data showing a direct correlation between the existence of ethnic intimidation laws and a decrease in bigotry or bigotry-related violence, though, there is something about having such laws "on the books" that is reassuring and beneficial.²²⁸ The state's affirmative recognition of the special harms of these crimes and its effort to combat them represents a societal value that is perhaps as important to us as the values of tolerance and freedom of thought and expression. Within the First Amendment context specifically, the cost to the scope of the marketplace of ideas of punishing expressions of bigotry is at least partially offset by the communicative value of the state's taking such a position. That, too, is a contribution to the societal debate.²²⁹ Even without regard to effectiveness in solving the targeted problem, we want our government to take a stand, to make a statement; it is, after all, *our* statement, as a society, of what we consider unacceptable. Such a statement has both self-affirming and educative value.

We Americans love the symbolic gesture: witness the blossoming of yellow ribbons to express solidarity with hostages and soldiers overseas. Making a gesture is a response to a problem. It

227. This is true of every type of government protection. It seems particularly dangerous in the ethnic intimidation context because the protection can mask hostilities that remain and perhaps fester and grow—and then catch their targets unprepared when the protection is removed. See *infra* text accompanying note 231.

228. This symbolic utility, however, would appear to be equally well served by government action other than imposition of criminal sanctions, such as special laws requiring reporting of and keeping statistics on bias-related crime, and by education. Symbolic utility would certainly be served just as well by statutes free of constitutional defects.

229. See L. BOLLINGER, *supra* note 208, at 72.

speaks to our desire to be *doing* something. Notwithstanding the self-affirming and educative value of such gestures, however, there is the danger of their distracting us from taking action that would be more than merely symbolic. A purely symbolic action *may* stimulate us to take further, substantive action. But to the extent that tying a yellow ribbon to the front porch *satisfies* our desire to "do something," we will be that much less likely to contact our elected officials to press for more effective action. In the same way, if enacting a largely ineffective ethnic intimidation statute allows us to feel that we have taken steps to eliminate bigotry and bias-related crime and thus reduces somewhat or even entirely our feeling of the urgency of doing more, the enactment of that law ultimately *slows* the process of combating bigotry.

To the extent that ethnic intimidation legislation is intended as a tool to combat bigotry itself, not simply its expression, even effective laws may be partially self-defeating if they create increased resentment toward disempowered groups by members of the majority. One thinks of the position of the "teacher's pet": the status affords its holder some special protection and favor from the teacher, but it is guaranteed to create instant dislike by the other students and result in social ostracism—not to mention surreptitious attacks and sabotage. Even a teacher's protection of a student because of a handicap seems more likely to inspire pity than respect and inclusion as an equal. As a schoolchild resents or pities a peer singled out for special protection by the teacher, so may an adult resent or disdain other members of society afforded special, paternalistic treatment by the state. The effect may even come around full circle to increase the expression as well as the fact of bigotry, as increased resentment would foreseeably result in increased bias-related crime.

By the same token, non-criminal approaches to eradication of bigotry that may well prove more effective than criminal sanctions may be ignored if we pin our hopes to criminal sanctions. These include education and positive incentives for and reinforcement of nonbigoted action. Social pressure may work *better* to discourage bigotry than criminal sanctions, and may even be deterred by the existence of criminal sanctions. There is no criminal penalty for not knowing the multiplication table; schools do not customarily teach degrees of homicide: which is more familiar to the general public? Compare how we feel about income tax and speed limit laws with how we think about things such as charitable giving, civic participation, voting, getting a college education, religious observance, and attendance at public holiday events. Without the threat of criminal

sanction, most of us would be unlikely to pay voluntarily the amount calculated by the IRS, on the sole basis that we had considered carefully the fiscal needs of the nation and our own financial situation and had finally determined that this outrageous amount was our fair share. If we didn't fear getting a ticket, many of us would (and do) drive as fast as we please. The imposition of those sanctions is premised on the belief that in these areas, people cannot be trusted to use their own judgment in a fair, honest, or proper way. The existence of the criminal penalties does not necessarily promote support for the underlying policies; on the contrary, absent general effort for the underlying policies it creates an environment in which people try to get around the laws. They look for tax loopholes and buy radar detectors, all without embarrassment or social censure. They may even brag about their successes. At best, most people do the minimum required by law, and consider anyone doing more to be foolish.

By contrast, there is no criminal penalty in the United States for failing to attend church, college, PTA meetings, charitable fundraisers, the voting booth, or community celebrations. Not everyone wants to do these "pro-social" things anyway, but hardly anyone would *want* to do them if the government were *forcing* us. The same Independence Day parade we may now look forward to eagerly would become a dismal and dreaded duty if we thought the police would be at our door on July fifth wanting to know why we had stayed home. The choice *not* to impose sanctions in these situations is based on a corollary premise to the one underlying the choice to impose them in the income tax and speed limit contexts: we know that real patriotism, benevolence, piety, intellectual curiosity, and civic responsibility are discouraged, not encouraged, by the threat of criminal sanction for failure to express them. In the income tax and speed limit contexts, however, we care more about compliance with the laws than we do with sincere support for the values they serve. In the other examples, we are more concerned with the sincerity of the belief.

The value of interethnic harmony that ethnic intimidation laws are meant to express and serve fit in this scheme with the "pro-social" contexts, in which we do not apply the force of criminal law. Society certainly cares about reducing the harmful effects of bigotry. It also cares that people vote, get an education, support their communities, and so forth. However, the ultimate goal is presumably to get people sincerely to accept and respect one another as equals. If the only way in which government tries to serve that end

is to threaten them with enhanced criminal penalties for failing to embrace that belief, then brotherhood will not become a truly accepted value, but a government requirement that people will try to get around, or at most comply with minimally.

There are two areas in recent history in which we have seen the effects upon patriotism of both voluntary and compulsory cooperation with a government program: public school flag pledges and military service. It is doubtful that either compulsory flag salutes or the draft created more actual patriotism. Perhaps more people were reciting the pledge and entering their country's service, but it would be disingenuous to claim that they were doing so because these compulsory programs had effectively stimulated their patriotic sentiments. When neither is required by law, however, there are still those who voluntarily salute the flag and enter the military, and their doing so freely is more likely to induce them and others to feel positively about their country than would their doing so under duress.

Criminalization is the state method of persuasion of last resort. Resort to criminalization of bigoted motives indicates that we are ready to give up on the possibility that, without the threat of criminal prosecution, people will eventually come to realize that bigotry is wrong. This official acknowledgement of defeat in the quest for interethnic acceptance and respect, in the same gesture that acknowledges the problem of ethnic intimidation, creates a symbolic message that runs counter to the self-affirming and educative value of the law.

The effectiveness of ethnic intimidation laws also depends upon the validity of the idea that control by the state works better to protect the disempowered than allowing liberty for bigots' display of their bigotry. But reliance upon government control can be ultimately far more dangerous than trusting the instincts of society. Escape from ethnic intimidation, most vividly expressed by terrifying pogroms, was one of the most compelling reasons Jews fled eastern Europe in the late nineteenth and early twentieth centuries. Those coming to the United States felt confident that they would be far safer from ethnic hatred and violence here, but not because the government offered Jews some sort of special protection. Rather, they relied upon the system's equal freedom, which included freedom to hate for those who hated them. This gamble, by and large, has paid off: antisemitic violence in the United States, though far from nonexistent, has been sporadic and never encouraged and ap-

proved by the state as it was in Europe.²³⁰ It was those who remained behind in Europe who died horrible deaths because of their ethnicity—and not at the hands of the mob. Rather, they were the victims of a repressive state that believed that it was dictating the proper relations between ethnic groups.²³¹

There is also the risk that ethnic intimidation laws will, due to their chilling effect on expression, undermine the value of even concededly worthless "hate speech" as a social barometer of people's true feelings about disempowered groups.²³² We may be led to underestimate the level of bigotry in our society if we impose a risk of criminal penalty for its expression; this is already a cost of nonlegal, social pressure. As one writer observed more than a century ago: "You have not converted a man because you have silenced him."²³³ We take comfort in that thought when we feel we could hold fast to our own beliefs if ever we were forbidden their expression. We must be careful, however, to remember that the same principle applies also to socially undesirable beliefs, including bigotry, that we as a society may repress in others. Adolph Hitler used the Weimar Republic's anti-hate-speech laws to publicize his cause and to play the martyr.²³⁴ Recent developments in the republics of the former Soviet Union, and elsewhere in eastern Europe, provide a sad illustration of the point: for most of a century, ethnic hatreds, while never completely invisible, were largely masked by a strong state policy repressing their expression for the state's own purposes.

230. Some commentators have urged the United States to ratify the International Convention on the Elimination of All Forms of Racial Discrimination, Article 4 of which requires ratifying countries to, *inter alia*,

declare as an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, . . . the provision of any assistance to racist activities, including the financing thereof; [and to] declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organization or activities as an offence punishable by law

Opposition to ratification by the United States, predictably, is based upon the conflict of these provisions with the requirements of the First Amendment. See Matsuda, *supra* note 36, at 2341-48. European nations, even those ideologically close to the United States, do not have this conflict. Perhaps some of those European nations, with a long history of official toleration of "beyond speech" hate crime such as pogroms, purges, and blood libel, feel they cannot afford a First Amendment as well as the United States can.

231. See A. NEIER, *supra* note 13.

232. See L. BOLLINGER, *supra* note 208, at 55; France, *supra* note 176, at 48.

233. J. MORLEY, ROUSSEAU (1876).

234. A. NEIER, *supra* note 13, at 163-65; France, *supra* note 176, at 48.

Under *glasnost*, those hatreds have resurfaced as shockingly fresh, intense, and widespread—even a generation later.²³⁵

In light of criminal ethnic intimidation laws' high costs, both to society as a whole and to the very groups intended to be protected by those laws, and their predictable low efficacy in serving the goals for which they were enacted, it appears that noncriminal approaches may be preferable, albeit imperfect.²³⁶ The majority of society condemns bigotry (at least publicly, and that is all these statutes could hope to achieve anyway), and has come to do so without the existence of ethnic intimidation laws. We are just as shocked by an account of an ethnically motivated attack whether the perpetrator is charged with ethnic intimidation or "only" with assault.

Every solution has a problem. It is true that enacting these laws lets us feel that we are *doing* something about interethnic harassment—they are a quick, simple fix for an extremely complex social ill.²³⁷ As the Supreme Court admitted in *Beauharnais*, "[o]nly those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color, or religion. . . the legislative remedy might not in practice mitigate the evil, or might itself raise new problems. . . ."²³⁸ The ADL ethnic intimidation model statute does at once too much and too little: too much, because it intrudes into constitutionally protected areas, and too little, because it is at best only a weak tool for combating bigotry, and may relieve us of the urge to do more.

The problem is the narrow perspective. Criminal ethnic intimidation laws are not the only arrow in our quiver. There are other ways to combat bigotry, ways that are more clearly constitutional, less threatening to constitutional liberties and values even if not held unconstitutional, less costly to society at large and to disempowered groups in particular, and more effective.

235. See Tumarkin, *Russians Against Jews*, THE ATLANTIC 32 (Oct. 1990); Kamm, *Romania's Jews Shaken by Rising Verbal Attacks*, N.Y. Times, June 19, 1991, at A6, col. 1.

236. Noncriminal approaches include, for example, education, incentives, and civil liability. Vigorous application of existing criminal statutes in "hate crime" situations is also an important alternative to penalty enhancement. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 670-71 (1943) (Frankfurter, J., dissenting) ("Reliance for the most precious interests of civilization . . . must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit.")

237. More cynically, they also present a wonderful grandstanding opportunity for legislators: how can they lose by "standing up against bigotry"?

238. 343 U.S. at 262.

CONCLUSION

Dean Bollinger notes that, historically, governmental repression of expression in the United States has not aroused public outcry; to the contrary, it has enjoyed broad popular support. Thus, "[i]f there is a problem of a tendency to excessive intolerance toward speech activity, it would seem to be not with 'the government' alone but with 'the people' as well, acting through their government."²³⁹ He recounts John Stuart Mill's observation that

such phrases as 'self-government' and 'the power of the people over themselves,' do not express the true state of the case. The 'people' who exercise the power are not always the same people . . . over whom it is exercised; and the 'self-government' spoken of is not the government of each by himself, but of each by all the rest.²⁴⁰

Because the majority in any era "may desire to oppress a part of their number . . . precautions are as much needed against this as against any other abuse of power."²⁴¹ Walter Bagehot, the English political economist, shared Mill's view that intolerance is a natural human inclination:

What was said so long ago of slavery seems to be equally true of persecution—it "exists by the law of nature." It is so congenial to human nature, that it has arisen everywhere in past times, as history shows; that the cessation of it is a matter of recent times in England; that even now, taking the world as a whole, the practice and the theory of it are in a triumphant majority. Most men have always much preferred persecution, and do so still; and it is therefore only natural that it should continually reappear in discussion and argument.²⁴²

We have heard this idea before. These writers seem to be arguing for the broadest possible protection even of repugnant opinion, such as bigotry. Yet the present-day echo of this idea, that intolerance is an ugly part of human nature that we wish to overcome through civilization, has appeared elsewhere in this discussion not in support of tolerance of bigoted expression, but in the anti-bigotry lament of the Seventh Circuit in *Collin v. Smith*.²⁴³ In those parts of its opinion, the court, although bound by the Constitution to strike down the ordinances, repeatedly expressed its repugnance at

239. L. BOLLINGER, *supra* note 208, at 79.

240. *Id.* (quoting J.S. MILL, *supra* note 219, at 6).

241. *Id.*

242. W. BAGEHOT, *The Metaphysical Basis of Toleration*, in 6 THE WORKS AND LIFE OF WALTER BAGEHOT 220 (1915).

243. See *supra* notes 13, 19-20 and accompanying text.

the ideas of Nazism.²⁴⁴ In one passage, the court mourned that the veneer of civilization is so fragile, barely covering but not erasing what it sees as the base human *instinct* toward bigotry:

Recognizing the implication that often seems to follow over-protestation, we nevertheless feel compelled once again to express repugnance at the doctrines which the appellees desire to profess publicly. Indeed, it is a source of extreme regret that after several thousand years of attempting to strengthen the often thin coating of civilization with which humankind has attempted to hide brutal animal-like instincts, there would still be those who would resort to hatred and vilification of fellow human beings because of their racial background or their religious beliefs, or for that matter, because of any reason at all.²⁴⁵

The parallel observations of Mill and the *Collin* court suggest that *bigotry by individuals and repression by society are both natural instincts*—and that as we wish civilization to carry individuals beyond bigotry, so should we seek to civilize ourselves as a society and a state beyond repression. Moreover, they are not just two instincts of a kind: they are the very *same* problem.²⁴⁶

This may be the end of the circle that began with the observation that this whole subject is "a debate between one side and itself," and that this curious circumstance might provide the key to its resolution. We began by noting that those supporting and those opposing ethnic intimidation laws each saw the other's viewpoint clearly, and in fact sympathized with it as well. That is no irony, after all. Both "sides" of the debate are expressing not opposite or even slightly divergent values, but *the very same one*: the value of tolerance. The difference is only in the level of focus. The proponents of ethnic intimidation laws are focusing on *individual* intoler-

244. One of the judges of the Seventh Circuit observed with respect to *Collin* that "each court dealing with these precise problems . . . feels the need to apoloigize for its result." 578 F.2d 1197, 1211 (7th Cir.) (Sprecher, J., concurring in part and dissenting in part), *cert. denied* 439 U.S. 916 (1978). This phenomenon has continued in the recent ethnic intimidation cases. See, e.g., *State v. Van Gundy*, No. 90 AP-473, 1991 Ohio App. LEXIS 5589 (Apr. 16, 1991), at *18, *appeal granted*. It has been suggested that this sort of condemnatory language on the part of a court, even while ruling in favor of the First Amendment claimant, is itself coercive in that it represents government endorsement of a particular viewpoint. See L. BOLLINGER, *supra* note 208, at 28-29.

245. 578 F.2d at 1210.

246. This perspective also gives meaning to what seems to be only a coincidental and slightly confusing double use of the term "motive" in discussing ethnic intimidation statutes. We think of motive both on the part of the offender in committing the underlying offense, and on the part of the government in enacting the statute, in order to show the government intended to punish motive and to combat bigotry. Perhaps it is not such a coincidence: we are concerned with both the individual's propensity toward intolerance and society's identical propensity.

ance, *i.e.*, bigotry; the critics are focusing on *societal* intolerance, *i.e.*, repression. Like the blind men of the fable, each examining a different part of a single elephant, we are all really talking about the same thing.

Perhaps the solution, then, is simply to step back a bit, to the point where the two foci are seen in their true perspective: not as opposing one another, but as different points on a single arrow pointing in one direction. There may indeed be an approach that does not require us to trade one view off against the other, a way to target both levels of intolerance at once, rather than compromise or even sacrifice one level. The fact that it is the same people on both "sides" can justify a little optimism.

Mr. SENSENBRENNER. We will send you a copy of it, Dr. Riff. It seems to me you ought to refer this to your legal staff for some kind of rebuttal. And if you would like to have that included in the record, we would be very happy to do that, provided it comes back before the chairman closes the record.

Mr. RIFF. As far as I know, such a rebuttal does already exist, and it would probably be in the form of amicus briefs that are being submitted in various cases under judicial review at the moment.

Mr. SENSENBRENNER. Thank you very much.

Now, Mr. Katz, before I became the ranking Republican member of this subcommittee, I spent 9 years as the ranking Republican member of the Civil Rights Subcommittee of the House Judiciary Committee, and I have had a say in the shaping of the civil rights laws that have been crafted by Congress over the better part of the last decade.

I have never favored the inclusion of sexual orientation in civil rights laws, for the following reason, and it is not because I go around bashing gays, because I don't think I do that. But our civil rights laws have protected people based upon status that they really have no control of: Their race, their creed, their national origin, their gender, and in certain cases disabilities as well.

Sexual activity, however, is voluntary. Most people engage in it. Some do not. And we never have extended the protection of civil rights laws to activity that is voluntary and at the choice of the individual. The protection has been extended to things that they basically were born with or can't help, or in the case of disability, something that they may have acquired as a result of an accident or injury or some physical or mental condition.

The concern that I have has been expressed in nonemotional terms during the debate on whether to extend civil rights protection based on sexual orientation, as well as a lot of very extraneous arguments that have been launched against this. But I am wondering how you respond to the concern that I have got relative to saying that this law proposes to expand or increase penalties for crimes that are committed against people, again, because of a voluntary activity.

Mr. KATZ. Well, first of all, I thought your choice of language was quite interesting, in that you said that the civil rights law protections weren't based on a person's activity, but were based on the characteristics with which he was born or that he acquires. The use of the words "sexual orientation" in and of itself is not asking people to give civil rights based on activities that people perform in their bedrooms. It is based on their orientation.

I can use myself as an example. I was brought up in a heterosexual family. My parents were together for 47 years. All my siblings are heterosexual. All my teachers, as far as I knew, were heterosexual. All I was ever taught by society was to be heterosexual, and it was a very nice life style to emulate. My parents had a loving home and still do. And I am gay. It took me many years to finally accept that, to say, wait a second, what I am being taught doesn't compute with who I am.

I am not asking someone to pass a law based on any activities in which I engage. I am asking someone to recognize just the fact

that I or any other person who is a member of the lesbian or gay community, is who we are. We don't know whether it is genetics. We don't know whether it is societal responses. We don't know whether it is this new theory regarding the hypothalamus, which, of course, ignored a discussion of lesbians in totality. But the point is that we are who we are. We were taught to be something different, but we are who we are.

When people are attacked, and we are talking about hate crimes legislation, they are not being attacked because they are performing a sexual act. They are being attacked because they are perceived to be a member of a specific class of people. They are attacked, as you saw on that chart, in areas of the Village. They don't even have to be gay or lesbian. It could be two women who are good friends or two men that are good friends walking together. Just because they are walking in that neighborhood, they are attacked.

Mr. SENSENBRENNER. Let me say that anybody who is attacked, the perpetrator of the attack should be prosecuted to the fullest extent of the law, and it shouldn't make any difference whether the person who is attacked has one sexual orientation or another. An attack is an attack, and people who are found guilty of that should be punished severely.

Mr. KATZ. But the point is, just as in the case of Wilfred Phillip who wasn't here, that house wouldn't have been fire bombed if he was a white person moving into that neighborhood. That house was fire bombed specifically because he was a person of color. He was moving into a white neighborhood, and that home was fire bombed not just to keep Mr. Phillip and his family out of that neighborhood, but to tell every person of color, don't you dare move into this neighborhood.

The same thing happened to Julio Rivera. He was walking in a neighborhood that was a known gay neighborhood. There are a lot of gay bars in that area. Jackson Heights is considered to have the second largest concentration of gays and lesbians in this city. Those guys went out looking just to find a homo, a homeless person or a drug addict. They went out specifically to kill someone because of who they were.

And that is what happens in most of these crimes. The New York City Police Department will say most hate crime perpetrators are young men from the ages of 15 to 24. They get together in groups to commit a crime. In the cases of bashings against gay men and lesbians, they often don't even live in that neighborhood. They come from a different neighborhood. They are kids who have never committed any other crimes before. They have no criminal records. They come from so-called good homes with strong family values, and they get together and prove their machoness to each other. They pick their favorite choice of weapon, most times it is a baseball bat, and they drive around the Village. They are not looking for a night's softball game; they are looking to bash some lesbians or gay men just because of who they are.

Mr. SENSENBRENNER. I don't think you answered my question, Mr. Katz, because I asked why civil rights protection should be extended to people based upon an activity which is admittedly voluntarily.

Mr. SENSENBRENNER. OK. I have a question I would like to ask you, Mr. Katz. If we are talking about hate crimes, what about those that are perpetrated by gays and lesbians against a nongay and lesbian community, specifically the interruption of mass and Cardinal O'Connor's sermon by a rather vocal gay rights organization called ACT-UP. Should they be prosecuted for a hate crime because of hatred toward the teaching of the Catholic Church or not?

Mr. KATZ. First of all, ACT-UP is an AIDS activist organization, it is not a gay rights organization. Second of all, there were 4,500 people that participated in that demonstration. Most of them were outside the church. About 30 members went inside the church. One individual out of the 4,500 people destroyed the host, which was a religious symbol. If someone could prove that hate was the motivation, then pursuant to the proposed New York State hate crimes law, if it is ever passed, they could be prosecuted.

I think that sometimes we forget what causes people to get to that point. If you destroy a religious institution, if you vandalize a religious institution, that to me is a hate crime. If you interrupt someone's speech, someone's homily, someone's sermon because that person has contributed to an atmosphere of gay bashing in the city, I think that is a question of freedom of speech. But if you are talking about vandalizing the church, destroying any of the property of the church, then I think you might be able to call that a hate crime.

Mr. SENSENBRENNER. Cardinal O'Connor doesn't have the freedom to preach a homily in his own cathedral?

Mr. KATZ. I think everyone has the freedom to speak, to give a sermon in their own cathedral, their own house of worship. I think people also have the right to object to something when it specifically encourages people to hurt others. The problem with Cardinal O'Connor is, that he does not always recognize the separation between church and State in this society. He uses the influence of the church many times to overstep the bounds of the separation between church and State.

He has the right to make his speech and to give a sermon. An individual also has the right to say, "Wait a second, this is killing us." And that is the effect sometimes of what the cardinal has done.

But I agree with you that if you destroy church property, that to me could be a hate crime.

Mr. SENSENBRENNER. Thank you very much, Mr. Katz.

Without objection, the written testimony will be received in the record by Daniel Bibel, program manager of the Massachusetts Crime Reporting Unit and Jack McDevitt of Northeastern University; and John Torok, from the Committee Against Anti-Asian Violence.

[The prepared statements follow:]

Remarks to the House Judiciary Committee,
Subcommittee on Crime and Criminal Justice

Concerning Hate Crime and the Hate Crime Statistics Act

Mr. Chairman, members of the Committee:

My name is Daniel Bibel. I am the Program Manager of the Massachusetts Crime Reporting Unit, in which position I supervise the collection of Uniform Crime Reporting forms and Hate Crime data from state, local, and campus police in the Commonwealth of Massachusetts. I am also the current President of the Association of State Uniform Crime Reporting Programs, the national organization of State UCR programs. In addition, I am the co-author of the upcoming initial hate crime report resulting from the Hate Crime Statistics Act of 1990.

My name is Jack McDevitt. I am the Associate Director of the Center for Applied Social Research at Northeastern University. I have conducted research on the topic of hate crime both in Boston and nationally. I have also conducted training programs for law enforcement officials regarding the identification and investigation of hate motivated violence. With Daniel Bibel, I am co-authoring the upcoming initial Hate Crime Report resulting from the Hate Crime Statistics Act of 1990. We appreciate the opportunity to share our experiences in the area of Hate Crime with you.

Hate crimes are serious criminal events. They affect both the victim and the community in ways like no other crime. For victims, these crimes invoke incredible fear because a victim carries with him or her the cause of his/her victimization wherever s/he goes. For example, if a man is attacked because he is black, he may be attacked again for that same reason; on the street, at work, or even at home. This makes hate crime victims feel unusually vulnerable. Additionally, the occurrence of hate crimes tear at the fabric of our communities. These crimes often pit neighbor against neighbor and may have significant social and economic implications for the future of a community. The Hate Crime Statistics Act was passed as a first step towards addressing these crimes. The Act provided for the collection of information on hate crimes in an effort to increase our understanding of this phenomenon and to identify effective strategies in dealing with hate motivated violence.

Many states were collecting such data before the federal Hate Crime Statistics Act was passed in April of 1991. In Massachusetts, before our statute was passed, the Executive Board of the Massachusetts Chiefs of Police voted unanimously to support the concept of the collection of such data; and we have been collecting Hate Crime data since January, 1990.

We have also been fortunate in Massachusetts to have a strong supporter in Governor William F. Weld, who has called together representatives of all the interested and affected groups to comprise the Governor's Hate Crime Committee. This Committee monitors implementation of the Commonwealth's statute, has developed enabling regulations, and has just finished the development of a model policy for police agencies. The Committee is also sponsoring a state-wide conference on Hate Crime.

The passage of the federal statute was a very significant moment, however. By codifying the data collection through an act of Congress, Hate Crime became tangible to many police agencies and individuals in a way that a state statute would not. The Act defined Hate Crime somewhat differently than did many individual states (both in the types and kinds of protected groups and the criminal acts being counted), but these differences are similar to many distinctions between the Uniform Crime Reporting system in general and specific state statutes.

Observations

1. The Federal Bureau of Investigation has done an excellent job in developing data collection forms and training materials. Additionally, they have provided training to state Program Managers and members of the largest police agencies regarding hate crime in general and issues surrounding the reporting of hate crime specifically. These efforts have been applauded by both local and national advocacy groups.
2. The Bureau of Justice Statistics has provided significant additional support to the implementation of the Hate Crime Statistics Act by funding a research project to collect data and prepare a report for 1990 from data available during that year.
3. There is a continuing effort that must be undertaken to insure that all police agencies are aware of the provisions of the Hate Crime Statistics Act and Hate Crime reporting. We are doing an incomplete job if we ignore our responsibilities to inform potential victims of this new data collection system. The burden of this program must not be solely on the police. Police cannot report Hate Crimes to us if victims do not come forward to inform the police.
4. The Hate Crime Statistics Act calls for five years of data collection. Because of the training and education which is continually ongoing -- directed specifically at police, potential victims, and the public -- at the end of this period of time, we may just be beginning to get reliable and valid national Hate Crime numbers. It would be tragic to invest time and effort in the development and implementation of Hate Crime data collection to close the program when we are finally getting useful information. The FBI has already indicated its' willingness to continue

collecting data on Hate Crime subsequent to the five years provided for in the Act.

5. If we do collect useful data -- and we begin to have confidence in its reliability and validity -- do we not have a responsibility to use this data to begin the process of responding to hatred and bigotry? For example, can we use these data to develop model curricula to teach children not to hate?
6. There may be an interest in expanding the numbers or categories of 'protected groups' for which Hate Crime data are collected: gender, political groups, labor organizations, as is done in various states. This is a very difficult issue and we do not have a clear cut position on it. During the deliberation on potential expansion of Hate Crime categories, we must be very careful in our definitions. Most criminal offenses are motivated by animosity of some type. "Hate Crimes" must continue to be defined as crimes which are targeted at a victim because of that victim's difference. Just as all Inter-racial assaults are not motivated by bias, neither are all criminal acts between victims and perpetrators from differing groups Hate Crimes.

Recommendations

1. The present system of Hate Crime data collection from local police agencies should be maintained. While this effort will not develop accurate and reliable data for some time, it does have important advantages. The effort to collect hate crime data has been accompanied by an effort to train local law enforcement agencies (led by the FBI's Uniform Crime Reporting Program). This training has increased awareness of local law enforcement regarding the identification and investigation of hate motivated violence.
2. The most reliable data sources that presently exist should be developed and brought together as an alternative source of information on hate motivated violence in America. These sources should include data from cities which have been collecting information on Hate Crime for some time. These cities include Boston, New York, Chicago, Los Angeles, and San Francisco.
3. A study should be conducted to identify effective strategies to combat underreporting of hate crime information. This study should review strategies presently employed in jurisdictions across the country and prepare a national report for those states presently implementing hate crime reporting.
4. National and local advocacy groups should be encouraged to continue and expand their collection efforts because, while each is limited in its own way, they offer a different view of the phenomenon of hate motivated violence. In addition,

these groups should be encouraged to continue and expand their present efforts to support local law enforcement in their hate crime data collection efforts.

5. A series of research reports should be developed to address specific issues including: characteristics of hate crime offenders and victims; victimization patterns of various bias motivations; causes of hate violence; and effective strategies in dealing with hate crime offenders.

We appreciate the opportunity to present these remarks to the House Judiciary Committee, Subcommittee on Crime and Criminal Justice and we remain available to provide additional information if committee members believe it would be helpful.



COMMITTEE AGAINST ANTI-ASIAN VIOLENCE

191 East 3rd Street, New York, N.Y. 10009

(212) 473-6485

**Testimony by Committee Against Anti-Asian Violence, New York.
Subcommittee on Crime and Criminal Justice
of the House Committee on the Judiciary.**

Hearings on

Hate Crimes Sentencing Enhancement Act of 1992, H.R. 4797.

April 20, 1992.

**Prepared by John Hayakawa Torok, Esq.
Community Advocate**

INTRODUCTION

The Committee Against Anti-Asian Violence (CAA AV) strongly supports the enactment of the Hate Crimes Sentencing Enhancement Act of 1992, H.R. 4797.

CAA AV is a community based organization that addresses the increasing racist hostility and violence directed against people of Asian descent in the New York metropolitan area. Since 1986 CAA AV has organized Asian American communities to combat racial violence and police brutality. We advocate for victims, and educate community members and students about their rights and about racial and police violence.

We will start with a discussion of what we have learned about the nature of anti-Asian violence. Next we will provide a few statistics on anti-Asian violence. Finally, we will place anti-Asian violence in the context of Asian American legal and racial history.

CAA AV was formed in 1986 as a coalition educate members of the public in New York about anti-Asian violence. Our Inaugural case addressed police brutality in New York's Chinatown - the Wong/Woo case. On January 2, 1987, two police officers broke down the door of a Chinatown couple's apartment - without a warrant - based on an allegation that they had been stealing cable services. All four people in the apartment were severely

beaten. Mrs. Wong received a laceration above her left eye which required twelve stitches. The Wongs did not use cable t.v and did not have a converter box for cable. The Wongs and Woos were charged for assault, menacing, theft of services, and resisting arrest. CAAAV organized a community response to have the charges dismissed. Over 4000 signatures were collected in two weeks and a broad range of community organizations lent their support. Community members packed courtrooms whenever there was a court date. On April 1st, the Manhattan District Attorney's Office dismissed all charges against the Wongs and Woos, but refused to prosecute the police officers involved.

CAAAV organized a rally to protest the Manhattan District Attorney's failure to prosecute the police officers. Around 500 people showed up, and anti-racist organizers from the African American and latino communities spoke out in solidarity. The Civilian Complaint Review Board - the body charged with disciplining police for misconduct - also failed to substantiate the Wong/Woo claim. CAAAV found attorneys to represent the Wongs and Woos. The case was ultimately settled in 1989 for \$90,000.

This was our inaugural case, and obviously not every case has been as high profile.

TYPES OF ANTI-ASIAN VIOLENCE

We have learned in the last six years that there are essentially four basic varieties of anti-Asian violence. They include neighborhood-based aggression, general on-the-street attacks, police brutality, and youth/school-centered attacks.

With respect to neighborhood-based aggression, CAAAV has worked with several Asian families who moved into all-white neighborhoods. Such families become targets for repeated, if not constant verbal harassment, racist graffiti, property destruction, and vandalism. For example, a truck belonging to an Indian family living on Long Island was bombed. The vehicle was completely destroyed and parts of the house and yard were severely damaged. Local police often refuse to become involved in these cases despite requests by the victims for assistance, leaving the families unprotected. One

family in Staten Island felt so unsafe that they were forced to move out of the neighborhood. In a few cases, organized campaigns against Asian presence have been orchestrated. In Bensonhurst in 1987, thousands of racist, sensationalistic flyers were distributed. These claimed that Asians were taking over the neighborhood. In yet another neighborhood, residents held an anti-Asian march.

The attacks that are more "random" in nature, occur on the street (or in a subway or cab) without provocation. Deaths and serious injuries have resulted from such attacks. Just as the local police refuse to intervene in neighborhood-based incidents, claiming that they are petty neighborly disputes, they tend to overlook, if not refuse to acknowledge the bias-motivation for these "random" assaults. Most of the perpetrators of these attacks are either never identified or allowed to plea-bargain their way to lesser charges. Two years ago Henry Kwok Kin Lau was stabbed to death on the subway by a man who shouted 'hey, eggroll' before killing him. The police did not classify his death as bias-related. Another case in point is Rafique Ahmed. Four white men chased him for miles as he was driving his cab. They brandished a baseball bat at him during the chase. When his cab broke down he was severely beaten and his cab was partially destroyed. Only one suspect has been identified, and he has been charged with a misdemeanor.

Almost half of the cases that CAAAV has documented involve police abuse. In most of these, racial slurs were used. Police tend to target limited-English speaking immigrants to attack, because these persons often have the least access to the knowledge and resources that would allow them to fight back effectively. Frequently, police charge the victims of their attacks with assault, obstruction of justice and similar crimes. Victims are thus doubly victimized by having to fight baseless criminal charges, most of which do not go to trial. A toothless police review process combined with media indifference allows this state of affairs to continue.

Young people are not exempt from racial violence. In the schools, especially in areas where Asians are in the minority, Asian students are harassed and assaulted because they are Asian. Teachers sometimes ask their classes why non-Asian students do not model themselves on a group that has been stereotyped as the 'model minority.' Perhaps the most significant

attribute of 'model minorities,' when the concept originated in the 1960s, was their perceived passivity in the face of racist oppression. Teachers exacerbate inter-ethnic tension and resentment through perpetuating this dangerous, divisive stereotype and this increases Asian student victimization. Asian students are often perceived as passive, and are targeted for shakedowns, verbal harassment, physical violence, and other mistreatment.

As a victim advocacy organization, we have found that there are a variety of reasons why victims are reluctant to step forward and report to the police. In New York, language barriers and lack of familiarity with the law enforcement and criminal justice systems are major factors for the predominantly (80%) immigrant Asian population. Prior experiences with either hostile or racist police, or with agencies not sensitive to people with "different" backgrounds, is another factor discouraging Asian victims from seeking help. The single most important factor, however, is the overwhelming realization by victims that it doesn't matter whether they come forward because they won't get justice. Today, if a perpetrator commits an act of physical violence motivated by hate, while the act of physical violence may be penalized, that hatred has no bearing on the penalty. Victims know this and thus do not feel protected by the law.

STATISTICS

A 1986 U.S. Justice Department report showed that there was a 52% increase in hate crimes against Asian Americans. According to the New York City Police Department there was a 660% rise in anti-Asian violence in the first six years of CAAAV's existence. We believe that a significant proportion of anti-Asian incidents do not get reported to the police or any other agency because of language and cultural barriers.

Several factors affect this increase. The doubling of the Asian population during the 1980s, both nationally and locally, rendered Asians as a group more visible.¹ The economic instability of the United States,

¹Some statistics on the Asian American population increase in recent years. Nationwide, according to the U.S. census, the Asian American population increased from 1.5% to 2.9%, or from 3.7 million to 7.3 million between 1980 and 1990. New York state has the second

particularly during the 1990s, has generated a national climate that scapegoats Asians as being responsible for the country's economic problems. An example of such scapegoating is the pervasive Japan-bashing by some politicians and corporate leaders. Xenophobia or anti-immigrant sentiment also fuels the increase in violence.

CAAAV is now working on a five-year report which will analyze the numbers and varieties of anti-Asian violence in New York. The report should be complete by June.

LEGAL/RACIAL HISTORY

The judicial devaluation of the lives and dignity of people of color is not new. We will discuss Asian American legal and racial history as it relates to anti-Asian violence.

People v. Hall² was an 1854 California Supreme Court case which established testimonial exclusion of Chinese. In that case, a white man was convicted for the murder of a Chinese man, based on the testimony of another Chinese man who witnessed the murder. The court overturned the conviction, stating:

The same rule which would admit them to testify would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls. ... This is ... an actual and present danger.

The anomalous spectacle of a distinct people, living in our community, recognizing no laws of this State except through necessity, bringing with them their prejudices

largest concentration of Asian Pacific Americans after California. In New York city, Asian Pacific Americans at 513,000 represent 7% of the population. The census numbers are all low both because of the undercount and because of the failure to count undocumented persons. According to a 1987 United Way study, the fastest growing Asian American groups in the tri-state region are Vietnamese, Indians and Koreans. That same study projects a one million tri-state Asian American population for the year 2000. Although there has been Asian presence in New York for over 130 years, we have yet to elect an Asian American public official.

² People v. Hall, 4 Cal 399 (1854) In this case, the California Supreme Court construed a statute prohibiting the testimony blacks, mulattoes or Indians to include a prohibition on Chinese testimony through a rather tortured reading of the language.

and national feuds in which they indulge in open violation of the law; whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color and physical conformation; between whom and ourselves nature has placed an impassable difference, is now presented, and for them is claimed, not only the right to swear away the life of a citizen, but the further privilege of participating with us in administering the affairs of our Government.³

Baldwin v. Franks,⁴ an 1887 U.S. Supreme Court case, is also interesting. The uncontested facts were that the defendant conspired with others to drive Chinese out of Nicolaus, California "unlawfully and with force of arms, violently, and with intimidation." He also conspired to deprive the Chinese "of the privilege[s] of conducting their legitimate business[es] and ... earn[ing] a living, ... without any legal process".⁵ The Court found that federal courts had no authority to hold defendant in custody under Reconstruction era civil rights laws. The Chinese plaintiffs sought judicial protection from "drivings out" because these were a problem in the late nineteenth century. The best known occurrences were in 1871 in Los Angeles, where 19 people were killed, and 1885 in Rock Springs, Wyoming territory, where 28 died while being expelled from those towns.

Justice Harlan is often regarded as a "great dissenter." However, from an Asian American standpoint, his dissent in Plessy v. Ferguson,⁶ which made "separate but equal" the law of the land, leaves something to be desired:

There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the limited states, while citizens of

³ People v. Hall, 4 Cal 399, 404-405 (1854)

⁴ 120 U.S. 678 (1887).

⁵ *Id.* at 681.

⁶ 163 U.S. 537 (1896).

the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union are yet declared criminals, liable to imprisonment, if they ride in a public coach occupied by white citizens.⁷

The statement about Chinese immigrants being excluded and forbidden to become citizens by law is factually accurate. The 1882 Chinese Exclusion Act excluded Chinese laborers and codified an earlier case finding Chinese ineligible for naturalization. The Anti-Chinese movement even sought to ensure that children born to Chinese residents on United States soil would not become citizens. However, in an Asian American constitutional victory, the Court held that such children, born here, were United States citizens in United States v. Wong Kim Ark.⁸

We need only mention a few of the Supreme Court's other failures to extend protections to Asian Americans to make our case about the judicial devaluation of Asian American life and dignity. In United States v. Chae Chan Ping (The Chinese Exclusion Case),⁹ the Court upheld the 1882 Chinese Exclusion Act. In 1922, Terrace v. Thompson¹⁰ and Porterfield v. Webb,¹¹ upheld the constitutionality of Washington's and California's Alien Land laws. These prohibited aliens who had, respectively, 'not in good faith declared their intention to become citizens' and 'aliens ineligible to citizenship,' from taking or holding interests in land. Webb v. O'Brien¹² upheld a provision of California's 1920 Act prohibiting 'aliens ineligible to citizenship' from contracting to sharecrop agricultural land. Frick v. Webb¹³ upheld another provision of the Act forbidding the ownership of shares of stock in a corporation that either did or could acquire, possess, enjoy or convey agricultural land. The Supreme Court decided that Koreans and Japanese were not naturalizable in 1922. South Asians were declared ineligible in 1923. Filipinos were declared ineligible in 1934.

⁷ *Id.* at 561.

⁸ 169 U.S. 649 (1898).

⁹ 130 U.S. 581 (1889).

¹⁰ 263 U.S. 197 (1923).

¹¹ 263 U.S. 225 (1923).

¹² 263 U.S. 313 (1923).

¹³ 263 U.S. 326 (1923).

Finally, one of the great ironies of American constitutional jurisprudence is Korematsu v. United States.¹⁴ This case established a principle that is the linchpin of modern equal protection law, namely that governmental use of racial classifications is suspect and subject to strict scrutiny. However, Korematsu itself is the only time governmental action has survived the application of the strict scrutiny standard.

The roots of racist violence and racial subordination have always been economic. The cases in their historical context illustrate my thesis. In the early 1850s, white immigrant miners were forcibly driving Chinese miners out of the gold fields in order to ensure their control. In the 1870s and 1880s, both white farmers and townspeople drove Chinese out from rural areas in order to ensure their control of agriculture and local business. The land policies were enacted into law, and upheld by the Supreme Court in the series of cases from the 1920s that we cited earlier.

The penultimate driving out was the interment of 120,000 Japanese Americans during World War Two. The congressional Commission on Wartime Relocation and Internment of Civilians found that it was the result of racism, war hysteria, and a failure of political leadership. The commission also found that Japanese Americans lost property and business valued at \$2 billion in 1983 dollars. A number of historians have documented the role of agribusiness in lobbying for the exclusion/internment. The 442nd Regimental Combat Team - the most decorated military unit in United States history - was recruited largely from the camps. Some of the soldiers who liberated the Dachau death camp had parents and siblings who were interned in American concentration camps.

Our reading of recent Asian American "race" cases sometimes makes us wonder how much things have changed since the late nineteenth and early twentieth century. As recently as 1981, a federal court had to stop the Klan from driving out Vietnamese immigrant fishermen from Galveston, Texas. The facts in Vietnamese Fishermen's Association v. Ku Klux Klan¹⁵ show the

¹⁴ 323 U.S. 214 (1944).

¹⁵ 518 F. Supp. 993 (S.D. Tex. 1981) See also Vietnamese Fishermen's Association v. Ku Klux Klan 518 F. Supp. 1017 (S.D. Tex. 1981) (in which the African American judge responds to the Klan lawyer's motion that she recuse herself because of bias).

Klan engaged in armed shows of force, property destruction, threats and cross-burnings.

In Wards Cove Packing Co. v. Atonio,¹⁶ Asian American and Native American plaintiffs challenged their being segregated from and paid less than white workers in Alaskan salmon canneries. They were unable to persuade a majority of the 1989 term Supreme Court of our need for legal protection from such employment practices. While the Civil Rights Act of 1991¹⁷ rejected most of the 1989 Term Supreme Court's narrowing of employment discrimination plaintiffs' rights, it specifically excluded the Wards Cove plaintiffs. Ironically, it was Wards Cove decision which made Congress decide to overturn the 1989 Term decisions through legislation.

In 1982 Vincent Chin, a Chinese American, was killed by two autoworkers in Detroit. They thought he was Japanese and believed 'Japanese competition' to be responsible for the automobile industry's woes. Tried for murder, they were sentenced to \$3,000 fines and three years probation. A later civil rights prosecution was unsuccessful, and Vincent Chin's killers never served a day in jail. Today, the national discussion about "foreign" trade is similar to the discussion about "foreign competition" in Detroit in 1981-1982. CAAAV is concerned about the rise of anti-Japanese sentiment in the last few months because of the impact of such sentiment on Asian American individuals and communities. Many Americans are unable to distinguish between foreign nationals and Asian Americans. This is most frequently manifested as the surprise at how well individual Asian Americans speak english, no matter how many generations our families may have been here.

Activity similar to that described in Vietnamese Fishermen's Association v. Ku Klux Klan¹⁸ was directed at immigrant fishermen in Northern California during the mid-1980s. In 1988 in New Jersey, Indian Youth Against Racism organized to stop the "Dotbusters," a group with the

¹⁶ 490 U.S. 642 (1989).

¹⁷ Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

¹⁸ 518 F. Supp. 993 (S.D. Tex. 1981).

publicly avowed intention of driving Asian Indians out of New Jersey by any means necessary.

In 1989, Patrick Purdy killed six and wounded thirty children in a Stockton, California schoolyard with an assault rifle. The Vietnamese and Cambodian children were six-to-eight years old. Neither the police nor the media thought this was a racially motivated attack. California's Attorney General later determined it was. Patrick Purdy had dressed in military fatigues, was obsessed with the Vietnam war, and had selected a school with a large preponderance of Asian American students.

These are just a few of the incidents of racial killings and racially motivated campaigns against Asian presence in this country in recent years. Given the current federal judiciary's narrow interpretations of civil rights protections, legislation like the Hate Crimes Sentencing Enhancement Act of 1992, H.R. 4797 is absolutely essential. CAAAV strongly supports the enactment of this law. In these hard times, and this election year, we forget at our peril that the United States does not have a social safety net. But it has always had racial scapegoating.

Mr. SENSENBRENNER. On behalf of the chairman, Mr. Schumer, I would like to thank you and the other witnesses; also Rabbi Burg and the Congregation Pri Eitz Chaim for the use of the room; Brooklyn College for the use of the audio equipment; Mr. Lee Bursten, the stenographer; Dan Cunningham, assistant counsel; Bruce Morgan, clerk; Lyle Nirenberg, minority counsel; Dave Hecht, intern; Florence Stachel, district administrator; and Michael Tannen, special assistant from Mr. Schumer's staff.

Without objection, this hearing is adjourned.

[Whereupon, at 12:35 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

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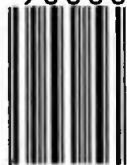
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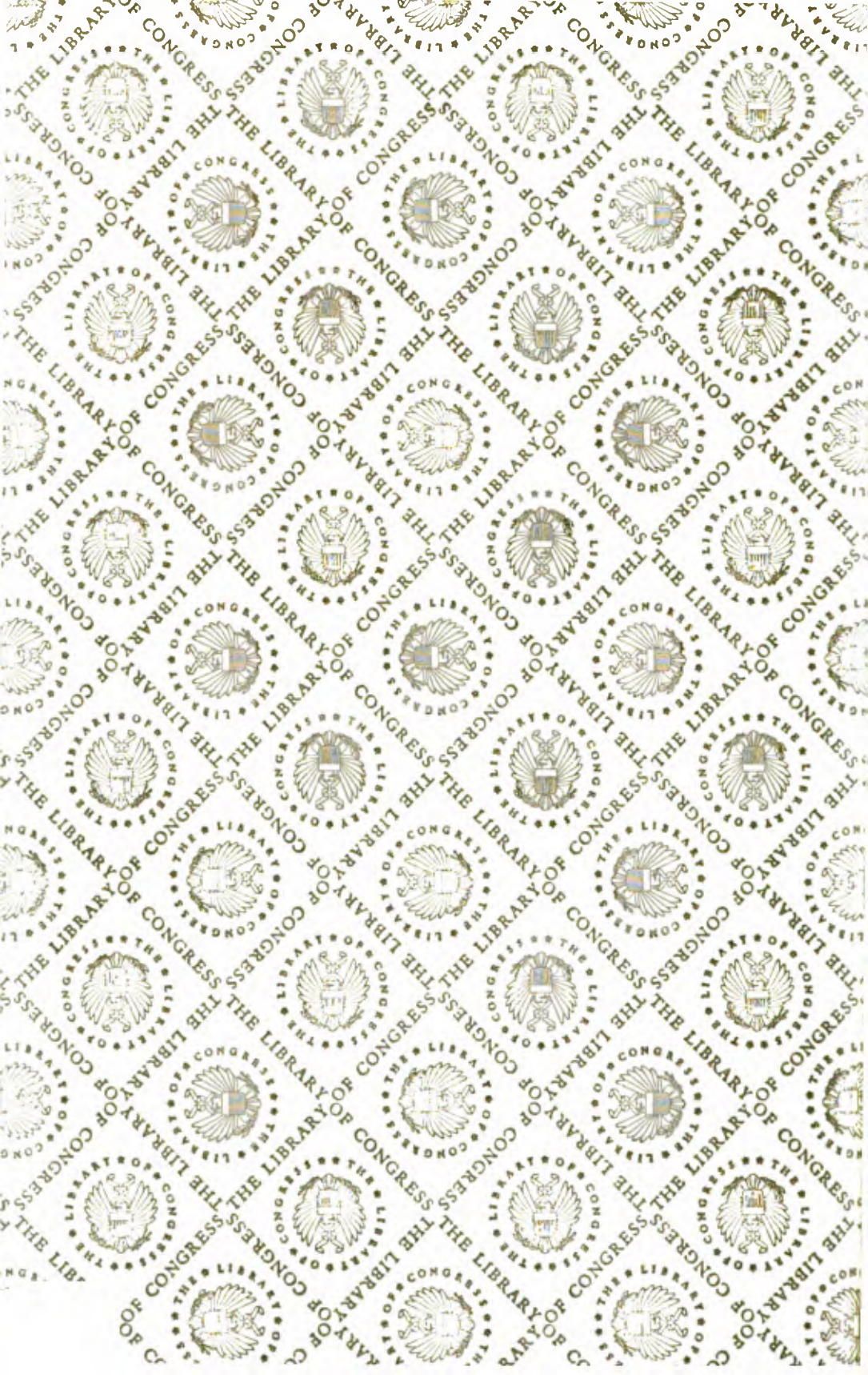
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